IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
Appellant,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR AIRCRAFT & DIESEL EQUIPMENT CORPORATION, APPELLANT.

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Printed as Exhibit A in Statement as to Jurisdiction, pp. 29-39.

(56 Stat. 226, 245; as amended by 56 Stat. 798, 982; as amended by 57 Stat. 347, 348 as amended by 57 Stat. 564.)

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Printed in Exhibit B in Statement as to Jurisdiction, pp. 39-60.

(58 Stat. 78, 92) (50 U.S.C. Appendix Section 1191).

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR AIRCRAFT & DIESEL EQUIPMENT CORPORATION, APPELLANT.

OFFICIAL REPORT OF OPINION BELOW.

The opinion of the District Court of the United States for the District of Columbia is reported in 62 Federal Supplement, page 520. That report shows the opinion to have been filed September 28, 1945.

After the complaint was filed, a three-judge court was constituted pursuant to the provisions of Section 380 (a), Title 28, U.S. Code. This Court consisted of Mr. Justice Miller, Mr. Justice Bailey and Mr. Justice Proctor.

Thereafter a motion for a temporary injunction was filed by appellant and motions for summary judgment and for dismissal of the complaint were filed by appellees. (R. 1-4) On June 18, 1945 the court so constituted heard oral arguments on these motions, during the course of which leave was granted appellant to file an amended and supplemental complaint alleging in detail the sales made on contracts executed prior to April 28, 1942. (R. 132) The motions previously made were, by agreement, to be considered as having been made upon, and to the complaint as amended and supplemented.

On July 2, 1945, the amended and supplemental complaint, hereinafter termed the complaint, with supporting affidavits was filed, and the court took the several motions under advisement upon the arguments previously made, and upon briefs. On September 28, 1945, that statutory court filed the opinion with the clerk of the court, which is reported in **62 Federal Supplement 520.**

On October 1, 1945, and prior to the entry of any order in this case, Mr. Justice Miller's resignation as an Associate Justice of the United States Court of Appeals, District of Columbia, became effective.

Because of the uncertainty as to whether Mr. Justice Bailey and Mr. Justice Proctor constituted a statutory court with power to enter any order after Mr. Justice Miller's resignation became effective, a new court was constituted upon appellant's motion, consisting of Mr. Justice Edgerton, Mr. Justice Bailey and Mr. Justice Proctor. (R. 438) This court considered the matter on the arguments made before the original court on June 18, 1945, and on all the briefs filed. On March 5, 1946, this last constituted court entered an order denying the injunction and dismissing the amended and supplemental complaint. (R. 439)

No other or additional opinion was filed.

STATEMENT OF JURISDICTION.

The statutory provision pursuant to which appellant invokes the jurisdiction of this Court is Section 380 (a), Title 28, U.S. Code.

In the complaint, it was alleged that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 as amended, (Public Law 528, 77th Congress) and the Renegotiation Act (Section 801 of the Revenue Act of 1943, Public Law 235, 78th Congress) were, and each was, repugnant to Article I, Section 1; Article III, Sections 1 and 2 of the Constitution of the United States and to the Fifth, Seventh and Tenth Amendments to the Constitution.

The complaint prayed for an interlocutory and permanent injunction restraining the appellees from further proceeding under the provisions of the Renegotiation Act. (R. 164-168)

The order entered March 5, 1946 denied the interlocutory and permanent injunction and dismissed the case. (R. 439)

Under the foregoing facts a direct appeal is allowed to this Court. (Section 380 (a), Title 28, U.S. Code) This Court so held in *Mine Safety Appliances Company* v. *Forrestal*, 326 U.S. 371, and in *Coffman* v. *Breeze Corporations*, 323 U.S. 316.

An order of probable jurisdiction was entered by this Court on May 27, 1946.

QUESTIONS PRESENTED.

The first question is whether the renegotiation acts or either of them contravene any of the provisions of Article I, Section 1; Article III, Section 1 and 2 of the Constitution of the United States, or the Fifth, Seventh and Tenth Amendments thereto. The District Court did not decide this question.

The second question is whether the District Court was correct in sustaining appellees' motion to dismiss the complaint and for a summary judgment, for the reason that equity had no jurisdiction. The District Court in sustaining the motion, and in entering judgment against appellant held that appellant had adequate remedies, and that the suit was prematurely instituted.

STATUTES INVOLVED.

In the Statement As To Jurisdiction, previously filed, there appears as Exhibit "A", pages 29-39, Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, (Public Law 528, 77th Congress), approved April 28, 1942, 56 Stat. 226, 245; as amended by Section 801 of the Revenue Act of 1942 (Public Law 753, 77th Congress) Chapter 619, approved October 21, 1942; 56 Stat. 798, 982; as amended by the Military Appropriation Act, 1944, (Public Law 108, 78th Congress) approved July 1, 1943, Chapter 158, 57 Stat. 347, 348; as amended by Public Law 149, (78th Congress) approved July 14, 1943, Chapter 239, 57 Stat. 564, (U.S.C. 1940 Ed. Supp. III Appendix 1191), which said act as so amended is referred to herein as the "first act," and which purports to apply to fiscal years ending before July 1, 1943.

There is also printed in the Statement As To Juris-

diction, as Exhibit "B," pages 39-60, the Renegotiation Act, being Section 701 of the Revenue Act of 1943, Public Law 235, 78th Congress, effective February 25, 1944, 58 Stat. 78, 92, which is referred to herein as the "second act," and which purports to apply to fiscal years ending after July 1, 1943.

STATEMENT OF THE CASE.

This case comes to this Court upon an appeal from an order denying appellant's motion for a temporary and permanent injunction and sustaining appellees' motions to dismiss the complaint and for summary judgment. (R. 449) The injunction was sought to restrain the appellees, members of the War Contracts Price Adjustment Board, herein called the Board, the Secretary of War, and the Under Secretary of War, from attempting to collect from appellant's customers the amount asserted to be due from appellant upon a determination of alleged excessive profits realized by appellant during the fiscal year ended November 30, 1943, made by the War Contracts Price Adjustment Board, pursuant to the Renegotiation Act.

The complaint alleged that the Renegotiation Act (enacted February 25, 1944, and referred to as the second act) and Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (enacted April 28, 1942 and referred to as the first act) were, and each was, in whole and in parts, repugnant to Section 1 of Article I; and Sections 1 and 2 of Article III of the Constitution of the United States and to the Fifth, Seventh and Tenth Amendments. (R. 145, 146, 153, 159, 166)

The purposes of asserting the unconstitutionality of both acts and at the same time praying an injunction restraining collection of the amount allegedly due under the second act were, (a) to demonstrate, as is now ad-

mitted by appellees, that appellant's belief that appellees would attempt to make collection prior to a determination of the validity of the law or of the correctness of the determination, was well founded, and, (b) to demonstrate the illegality and the injustice of the collection of an additional $270,000 under the second Act, prior to an adjudication of its constitutionality when $204,000 had already been collected under the first Act, alleged to be unconstitutional, and in regard to which no determination had been made.

The complaint alleged the making of the unilateral determination by Under Secretary of War, on October 27, 1943 and the filing on May 18, 1944, after the enactment of the Renegotiation Act of a petition for redetermination in The Tax Court. (R. 135, 136) The complaint also alleged that during the month of July 1944, the Under Secretary of War, the Honorable Robert P. Patterson, one of the appellees here, directed debtor customers of appellant (not the United States or any agency thereof) to pay into the Treasury of the United States the sum of $204,000. This sum represented the determination of the Under Secretary of War of excessive profits of $775,000 realized by appellant during the fiscal year ended November 30, 1942, less applicable tax credits. This sum was paid into the Treasury of the United States by debtor customers of appellant. (R. 137) The determination of excessive profits realized by appellant in the year 1942 was made pursuant to the provisions of the first act. The direction of the Under Secretary of War to make said payment and the actual payment was made *after* the enactment of the Renegotiation Act (February 25, 1944) and after appellant had filed in The Tax Court its petition for redetermination of alleged excessive profits for the year 1942. In the petition filed in The Tax Court appellant alleged the unconstitutionality of the first act under

which the determination was made, and alleged that if said act be constitutional, it had been applied in an unconstitutional manner to appellant's operations during the year 1942. That petition is still pending in The Tax Court.

The first act contained no provision for redetermination in The Tax Court, or for any review of the Under Secretary's determination. It was not until February 25, 1944, when the Renegotiation Act (the second act) was passed, that appellant had any statutory right to file a petition in The Tax Court for redetermination of asserted excessive profits for the year 1942.

The complaint alleged that $204,000 of appellant's funds had already been taken from it pursuant to an unconstitutional statute, the first act, and that this had been done while appellant was in good faith and in apt time contesting the validity of the Under Secretary's determination before the agency designated by the Renegotiation Act to make such a redetermination. (R. 137) The complaint alleged (R. 144), and the affidavit filed by the appellee Hirsch admitted (R. 118), that unless restrained by an injunction the appellees would do the same in connection with the 1943 determination as had been done in connection with the 1942 determination, namely, collect from customers indebted to appellant the sum of $270,000 (that being the amount of the determination of the War Contracts Price Adjustment Board for appellant's fiscal year 1943, after tax credits), regardless of the fact that appellant had also filed in The Tax Court its petition for redetermination pertaining to its fiscal year 1943, and regardless of the fact that in that petition appellant was asserting the unconstitutionality of the Renegotiation Act.

Other facts alleged in the complaint and admitted by the motion to strike are as hereinafter recited.

Aircraft and Diesel Equipment Corporation, appellant, operates a single manufacturing plant in the City of Chicago, Illinois, where, during the years 1942 and 1943, and in preceding and subsequent years, it manufactured and sold diesel fuel injection equipment, and aircraft engine precision parts. (R. 133, 134)

Following the close of its fiscal year, November 30, 1942, appellant filed with the War Department Army Air Forces, Midcentral Procurement District Price Adjustment Section at Chicago, Illinois, an agency designated by the Secretaries, its statement of sales, costs, taxes and profits and thereafter furnished additional data requested by such agency in respect of the business of the appellant during its fiscal year 1942 (December 1, 1941 to and including November 30, 1942). This data showed that during this period the company's total sales were $2,706,477.33, ($2,446,328.55 of which were determined to be subject to renegotiation by the administrative agency) and after deducting the cost of such sales and other expenses, but before federal taxes, the company's net profit was $940,-696.89. Appellant's income and excess profits taxes for the year were $683,255.41, leaving a net profit after taxes of $257,441.48. (R. 135)

On October 27, 1943, following conferences between appellant's officers and representatives of the Price Adjustment Board (another agency designated by the Secretary of War, but not the War Contracts Price Adjustment Board created by the Renegotiation Act), the appellee Patterson, then Under Secretary of War, purporting to act under powers delegated to him by the Secretary of War, under the first act made the "unilateral" determination as to excessive profits realized by appellant. In that unilateral determination order, Patterson recited that he had considered certain "financial operating and other

data, submitted by the contractor (appellant) or obtained from Governmental or other reliable sources relating to the profits realized by the contractor" and upon a consideration of that data, he determined that $775,000 of the profits realized by appellant during the fiscal year ended November 30, 1942 were excessive and should be eliminated. (R. 135, 170, 171) The nature of the data considered, other than that supplied by appellant, was and is unknown to appellant. The appellant requested that it be advised of the basis upon which such determination had been reached, but such information was denied. (R. 136, 172)

On February 25, 1944, the Renegotiation Act was passed, and pursuant to the provision of Section 403 (e) (2) of that Act, on May 18, 1944, appellant filed in The Tax Court of the United States its "Petition for Redetermination" of alleged excessive profits realized in the year 1942. In that petition appellant asserted the unconstitutionality of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 as amended, and further asserted that if the act should be determined to be constitutional, it had been applied in an unconstitutional manner to appellant's operations in a number of respects, and particularly in that there had been included as a part of the sales subject to renegotiation, sales made prior to April 28, 1942 and sales made prior to and subsequent to April 28, 1942 on contracts made by appellant prior to that date. (R. 136-137)

On April 29, 1944, knowing that appellant proposed to file its said petition in The Tax Court of the United States for the year 1942, the appellee Patterson directed debtor customers of appellant (not the United States or any department, agency or instrumentality thereof) to with-

hold from appellant, and for the account of the United States, the sum of $204,000. (R. 137)

About July 19, 1944, *after* the "Petition for Redetermination of Profits" for the year 1942 had been filed in The Tax Court and while said petition was pending there (as it still is), the appellee Patterson directed debtor customers of appellant (not the United States or any department, agency or instrumentality thereof) to pay into the Treasury of the United States, the sum of $204,000. These customers made such payments of $204,000 into the Treasury of the United States. Appellant was thus deprived of funds which otherwise would have been paid to it, and to that extent its working capital was decreased and impaired. (R. 137)

Following the completion of its 1943 fiscal year (December 1, 1942 to November 30, 1943) appellant filed with the War Contracts Price Adjustment Board, Army Air Force Procurement Section, its statement of sales, costs, expenses and profits and thereafter filed with such agency such additional data pertaining to its operations as was requested. This data showed that during that period appellant's total sales were $3,548,845.50 and that the cost of manufacture of such articles was $2,155,375.14, leaving a net profit of $1,393,470.36 *before* taxes. Appellant's income and excess profits taxes for the year were $991,340.37, leaving a net profit after taxes of $402,129.99. (R. 137)

On or about January 11, 1945, after conferences in Chicago and in Washington (R. 139, 140) between officers of appellant and representatives of the War Contracts Price Adjustment Board, appellant received an "Order Under Delegated Authority Determining Excessive Profits made by the appellee Patterson, Under Secretary of War, purporting to act as the delegate of the War Contracts

Price Adjustment Board. (R. 140) In this order, Patterson recited that "there were submitted by the contractor (appellant) and obtained from governmental or other reliable sources, certain financial, operating and other data relating to the contractor's business and the contractor's profits," and upon such data, and after giving effect to all of the factors referred to in said section (a) (4) (A) of the Renegotiation Act, he had determined that of the profits of $1,393,470.36 *before* taxes, $1,265,000.00 represented excessive profits and should be eliminated. (R. 140, 168, 169) After the filing of the original complaint in this suit, appellant received a statement purporting to show the basis of the determination, a copy of which appears in the affidavit of Major George T. Wofford. (R. 119-124)

On February 28, 1945, appellant filed, in accordance with Section 403 (d) (5) of the Renegotiation Act, with the War Contracts Price Adjustment Board, its request to said Board to initiate a review of the determination of its delegate, Patterson. (R. 140)

On May 3, 1945, the War Contracts Price Adjustment Board entered an order refusing to initiate such review, and by said order adopted Patterson's order dated January 11, 1945 determining excessive profits for the year 1943 in the amount of $1,265,000. (R. 140, 141) In this order appellant was advised that the applicable tax credit was $994,235.28 and demand was made for the sum of $270,765.72 payable to the Treasurer of the United States, to be delivered to the Chairman of the War Contracts Price Adjustment Board at Washington, D. C. (R. 174)

On April 4, 1945 the appellant filed, pursuant to Section 403 (e) (1) of the Renegotiation Act, the "Petition for Redetermination" in The Tax Court of the United States

to redetermine excessive profits, if any, for the fiscal year 1943. In that petition appellant asserted the unconstitutionality of the Renegotiation Act, and further alleged that if the Act should be determined to be constitutional, it had been applied in an unconstitutional manner to appellant's operations for the year 1943. (R. 142)

To this petition in The Tax Court, the respondents filed a motion to dismiss on the ground that it was filed during the time when the War Contracts Price Adjustment Board might initiate a review. (R. 142) This motion was argued before The Tax Court on May 16, 1945 and taken under advisement by The Tax Court. At the time of the filing of the complaint in this cause, no order had been entered in The Tax Court on the motion to dismiss. Appellant alleged in its complaint that should The Tax Court sustain said motion and dismiss said petition on the ground that it was prematurely filed, it would immediately file a second petition within 90 days from the date of the order of the War Contracts Price Adjustment Board. A copy of said second petition then prepared and printed was attached to the complaint as Exhibit F. (R. 142, 175-192) The Tax Court on or about June 30, 1945, dismissed the petition filed April 4, 1945 on the grounds that it was filed during the time the War Contracts Price Adjustment Board might initiate a review. Appellant filed a second petition in The Tax Court on or about July 2, 1945, covering its operations during the year 1943, in which petition the same assertions were made as in the former petition in respect of excessive profits realized during its fiscal year 1943, which had been dismissed as being prematurely filed, namely, that the act was unconstitutional, but if it should be found to be constitutional, it has been applied in an unconstitutional manner. This second petition for the fiscal year 1943 is, with the petition for the fiscal year 1942, still pending and undisposed of in The Tax Court.

The complaint then alleged (R. 143) and the affidavit of Col. Maurice Hirsch, Chairman of War Contracts Price Adjustment Board, Appellee (R. 117, 118) admitted, that the War Contracts Price Adjustment Board would (as had been done in the 1942 renegotiation) direct debtor customers of appellant to pay into the Treasury of the United States, the amount of excessive profits determined by the War Contracts Price Adjustment Board to be due for the year 1943 less applicable tax adjustments.

The complaint then alleged that said directions would be given and collection made before the Tax Court of the United States could reach any decision upon appellant's pending petition for the fiscal year 1943. (R. 143, 144) The complaint alleged that this action would be taken, notwithstanding that the Renegotiation Act and Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (R. 145, 153, 159, 166) were, and each was repugnant to Article I, Section 1, and Article III, Sections 1 and 2, of the Constitution of the United States and to the Fifth, Seventh and Tenth Amendments to the Constitution.

It was also alleged that there was substantial doubt as to the right, power and jurisdiction of The Tax Court of the United States to pass upon the constitutionality of the Renegotiation Act since The Tax Court was an agency of the Executive Branch of the Government (Title 26 U.S. Code 1100). (R. 161) Further doubt was alleged as to whether The Tax Court would, under those circumstances, exercise such right even if it had the power to do so. It was also alleged that the right accorded the appellant by the Renegotiation Act, to file a petition for a redetermination of the amount due was and is, in so far as the question of the constitutionality of the act is concerned, a barren one and one which would serve no useful purpose. It is

then alleged that in addition, the act contained no provision in respect to repayment to the appellant of the difference between any lesser amount The Tax Court of the United States might determine to be due as excessive profits and the amount the Board had determined to be due, or for the payment of interest on such amounts as shall have been paid. (R. 161, 162)

It was then alleged that, unless the injunction be granted as prayed, appellant would suffer irreparable injury in that appellees would order customers of appellant to pay $270,000 into the Treasury of the United States which otherwise would be paid to appellant, and because it would (a) compel appellant to run the risk of subsequently impaired credit or insolvency of such of appellant's customers as made such payment; (b) impair and reduce appellant's working capital; (c) require appellant to select one of two courses, either refuse to ship to customers not paying appellant, or to make said shipments knowing its capital would be impaired; and (d) force appellant to sue the customers to collect the sums paid into the Treasury, with the resulting ill feeling and loss of good will. (R. 162)

The complaint then alleged that appellant was without a plain, adequate and complete remedy at law in that, (a) the taking of appellant's funds amounted to the illegal seizure of property; (b) that the remedy suggested, namely, a petition in The Tax Court, was inadequate and ineffectual because during the pendency of said petition, and irrespective of the decision in that court, appellant's moneys would be appropriated; (c) that the suit, if suit could be instituted in the Court of Claims, might not be within the jurisdiction of that court, and no recovery of interest could be had; (d) that actions against the several debtor customers who made payments would require ap-

pellant to institute a number of suits in different jurisdictions and that such multiplicity of suits would be costly and vexatious; and (e) that any recovery from customers must be after The Tax Court determination. This "remedy" would be offset by the inevitable loss of good will resulting from suits against customers. (R. 162-164) An affidavit filed herein shows that if the government attempted to collect by directing customers of appellants to pay into the United States Treasury sixteen or more customers would be affected. (R. 132)

The complaint also alleged that of the total sales of $3,548,845.50 made during the fiscal year 1943, $2,780,009.82 were pursuant to contracts between appellant and the purchasers, made prior to April 28, 1942, and that the sales made under such contracts in the fiscal year 1943 were not subject to renegotiation under the first act, (enacted April 28, 1942) or under the Renegotiation Act, the second act, (enacted February 28, 1944). (R. 152, 153) It further alleged that the Acts were and each was repugnant to the Fifth Amendment to the Constitution of the United States. (R. 153) Appellant also alleged that in the performance of said contracts made prior to April 28, 1942, it received from time to time, shipping instructions in the form of purchase orders and that sales of $175,423.71 were made in the year 1943 upon shipping instructions or purchase orders received prior to April 28, 1942. (R. 153, 154) It was also alleged that sales made pursuant to purchase orders received prior to April 28, 1942 were not subject to renegotiation under the first act, or the Renegotiation Act. (R. 154)

As applied to sales made during the year 1942 similar allegations were made, namely, that of the total sales of $2,706,477.33, sales of $1,886,770.00 were upon contracts made prior to April 28, 1942 between appellant and its

customers, (R. 157, 158) and that $1,625,023.65 of the sales made in 1942 were made pursuant to shipping instructions or purchase orders received prior to April 28, 1942. (R. 158) It was further alleged that the first act was repugnant to the Fifth Amendment to the Constitution.

As applied to renegotiation for the year 1943, it was expressly alleged that the enactment on April 28, 1942 of the Sixth Supplemental National Defense Appropriation Act, 1942, could not subject plaintiff's sales in the fiscal year 1943 to renegotiate under the provision of the Renegotiation Act, enacted February 25, 1944, almost three months after the fiscal year had terminated. (R. 155, 156)

SPECIFICATION OF ERRORS TO BE URGED.

1. The Court below erred in refusing to grant an interlocutory injunction restraining the enforcement, operation and execution of the Renegotiation Act. (Assigned as error No. 1.) (R. 449)

2. The Court below erred in not granting both a temporary injunction and a permanent injunction enjoining the defendants from carrying into operation their plan to cause customers of the plaintiff to withhold moneys otherwise due the plaintiff, and to order said customers to pay moneys owed to the plaintiff into the Treasury of the United States. (Assigned as error No. 5.) (R. 450)

3. The Court below erred in granting defendants' motion for a summary judgment and entering such judgment. (Assigned as error No. 8.) (R. 450)

4. The Court below erred in dismissing the Amended and Supplemental Complaint without a hearing on the merits. (Assigned as error No. 11.) (R. 450)

5. The Court below erred in not enjoining the defendants from carrying into effect their plan to cause customers of the plaintiff to withhold money due to the plaintiff and to cause such money due to the plaintiff in the aggregate amount of approximately $275,000.00, to be paid into the Treasury of the United States, prior to the time The Tax Court of the United States shall have made its redetermination in accordance with the provisions of the Renegotiation Act. (Assigned as error No. 13.) (R. 450, 451)

6. The Court below erred in holding that equity had no jurisdiction of the cause because the plaintiff had an adequate remedy at law. (Assigned as error No. 15.) (R. 451)

7. The Court below erred in holding that equity had no jurisdiction because no irreparable injury would result to the plaintiff if the relief prayed for, the issuance of a temporary injunction and a permanent injunction, were not granted. (Assigned as error No. 17.) (R. 451)

8. The Court below erred in holding that the suit was prematurely filed because administrative remedies afforded by the Statute are adequate. (Assigned as error No. 21.) (R. 451)

9. The Court below erred in dismissing the Amended and Supplemental Complaint without determining the questions of the constitutionality of the Renegotiation Act, (Assigned as error No. 23.) (R. 452)

10. The Court below erred in not holding that the Renegotiation Act is in violation of the Fifth Amendment to the Constitution of the United States in that it permits the taking of plaintiff's property without due process of law. (Assigned as error No. 26.) (R. 452)

11. The Court below erred in not holding that the

Renegotiation Act is unconstitutional in that by its terms it enables or permits administrative or executive officers of the United States to exercise the power to make laws, a power exclusively vested in The Congress of the United States under the provisions of Article I, Section 1, of the Constitution of the United States. (Assigned as error No. 28.) (R. 452)

12. The Court below erred in not holding that the Renegotiation Act is unconstitutional in that it enables or permits executive or administrative officers of the United States to determine that a liability on the part of a person to the United States exists, the amount of such liability, and authorizes such officers to collect the amount of such liability as so determined, all of which said functions are exclusively vested in the judicial branch of the Government of the United States by the provisions of Article III, Sections 1 and 2, of the Constitution of the United States. (Assigned as error No. 30.) (R. 453)

13. The Court below erred in not holding the Renegotiation Act is unconstitutional in that it deprives a person of a jury trial in a cause which the United States of America purports to have against such person, when the amount involved exceeds Twenty ($20.00) Dollars. (Assigned as error No. 32.) (R. 453)

14. The Court below erred in not holding the Renegotiation Act unconstitutional insofar as the effect of the provisions of Section 403 (c) (2) and 403 (e) (1) are concerned in that said Sections authorize administrative or executive officers of the Government of the United States to take a person's property before the administrative process by which the amount due to the United States from such person has been finally determined, in violation of the due process clause of the Fifth Amendment. (Assigned as error No. 33.) (R. 453)

15. The Court below erred in not holding the Renegotiation Act unconstitutional because it precludes in its terms any opportunity by the plaintiff to have a constitutionally organized court determine whether its property has been taken without due process of law in violation of the Fifth Amendment to the Constitution of the United States. (Assigned as error No. 34.) (R. 453)

16. The Court below erred in not holding the Renegotiation Act unconstitutional as violative of the Fifth Amendment to the Constitution of the United States in that it purports to authorize the taking of property which had vested in the plaintiff prior to the enactment of the Renegotiation Act. (Assigned as error No. 35.) (R. 453, 454)

17. The Court below erred in dismising the Amended and Supplemental Complaint without determining the questions of the constitutionality of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944. (Assigned as error No. 36.) (R. 454)

18. The Court below erred in not holding Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, to be in violation of the Fifth Amendment to the Constitution of the United States in that it permits the taking of plaintiff's property without due process of law. (Assigned as error No. 39.) (R. 454)

19. The Court below erred in not holding that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, is unconstitutional in that it violates Article I, Section 1, of the Constitution of the United States by permitting executive or administrative officers to exercise legislati-

power vested exclusively in the Congress of the United States. (Assigned as error No. 40) (R. 454)

20. The Court below erred in not holding that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, is unconstitutional in that it enables or permits executive or administrative officers of the United States to determine that a liability on the part of a person to the United States, exists, the amount of such liability, and authorizes executive or administrative officers to collect the amount of such liability as so determined, functions which are exclusively vested in the judicial branch of the United States by the provisions of Article III, Sections 1 and 2, of the Constitution of the United States. (Assigned as error No. 43.) (R. 455)

21. The Court below erred in not holding that Section 402 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, is unconstitutional in that it deprives a person of a jury trial in a cause which the United States of America purports to have against such person, when the amount involved exceeds Twenty ($20.00) Dollars. (Assigned as error No. 46.) (R. 455, 456)

22. The Court below erred in not holding Section 403 of the Sixth Supplemental National Defense Appropriation Act 1942, as amended prior to February 25, 1944, unconstitutional, because it precludes in terms, any opportunity by the plaintiff to have a constitutionally organized court determine whether its property has been taken without due process of law in violation of the Fifth Amendment to the Constitution of the United States. (Assigned as error No. 48.) (R. 456)

23. The Court below erred in not holding Section 403 of the Sixth Supplemental National Defense Appropria-

tion Act, 1942, as amended prior to February 25, 1944, unconstitutional as violative of the Fifth Amendment to the Constitution of the United States, in that it purports to authorize the taking of property which had been vested in the plaintiff prior to the enactment of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942. (Assigned as error No. 49.) (R. 456)

24. The Court below erred in not holding the Renegotiation Act and Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, to be arbitrary, capricious, unequal in operation and in result in violation of the Fifth Amendment to the Constitution of the United States in that it purports to enable the taking of plaintiff's property without due process of law. (Assigned as error No. 51.) (R. 456, 457)

SUMMARY OF ARGUMENT.

This suit was instituted to restrain the collection of $270,000 alleged to be due from appellant upon a determination of excessive profits of $1,265,000 made by the War Contracts Price Adjustment Board for appellant's fiscal year 1943. The complaint alleged that the Renegotiation Act (the second act) in terms applicable to appellant's fiscal year 1943, and Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, (the first act) in terms, applicable to appellant's fiscal year 1942, were, and each was, in violation of the provisions of Article I and Article III of the Constitution of the United States, and in violation of the Fifth, Seventh and Tenth Amendments to the Constitution. The invalidity of the first act was asserted since under its provisions $204,000 due appellant had been paid into the Treasury

of the United States by appellant's customers in July 1944, pursuant to an order of the Under Secretary of War upon a determination of excessive profits of $775,000 made by him for appellant's fiscal year 1942.

If the first act be unconstitutional, or, the action taken was beyond the powers conferred by it, the $204,000 illegally collected should be set off against the $270,000, even if the second act be constitutional. If both acts be unconstitutional, as we contend, appellant will be entitled to payment of the $204,000 collected, but the complaint does not request repayment from the Government of said $204,000.

For each of the years 1942 and 1943, appellant has filed in The Tax Court of the United States its Petition For Redetermination as permitted by Sections (c) (1) and (c) (2) of the Renegotiation Act. Each of these petitions are still pending in The Tax Court.

The District Court did not pass upon the constitutionality of either act. Its order allowed appellees motion to dismiss, and for summary judgment upon the grounds that equity had no jurisdiction because, in the opinion of the Court, the appellant had adequate remedies.

I.

It is asserted by appellant, under Point I that both acts violate the provisions of Article I, Section 1 of the Constitution of the United States, vesting in the Congress all legislative power.

Under this subject it is asserted that while Congress may delegate to administrative agencies the "filling in of the details" it cannot delegate to such agency the legislative powers vested in Congress. Both acts provide that they shall commence operation, not upon the happening of any ascertainable event, but that they shall become

operative when in the "opinion" of the agency, excessive profits have or are likely to accrue. Under the first act, Section (c) (1) the opinion of the Secretary calls the Act into operation. Under the second act, Section (c) (1) the opinion of the War Contracts Price Adjustment Board does so. Under both acts the "opinion" is the sole requirement and nothing in either of the acts controls that opinion. There is no requirement that there be any finding of fact pursuant to which the act is called into operation as to any particular contractor, and the agency has never made such a finding of facts.

Under the first act, "excessive profits" are those profits which are found as a result of renegotiation to be "excessive." It is asserted that this definition, without any standards for the guidance of the administrative agency is so vague and uncertain as to render the act violative of Article I, Section 1 of the Constitution. In passing the second act the Congress recognized the absence of any standards in the first act. In the second act "excessive profits" are again defined as those profits which are determined to be excessive. In such determination, however, the War Contracts Price Adjustment Board is directed to take into consideration seven factors, one of which (the seventh) may be any additional factor the Board may adopt and publish. (Subsection (a) 4 (A)). None of the seven factors are objective. Each is subjective and dependent upon the individual opinion of the renegotiator. The so-called standards are not controlling or determinative. All that need be done, in the terms of the statute, is to take those factors into consideration.

Appellant asserts that the subject matter of the statute determines to a large extent the character and the certainty of the standards required to bring the law within the constitutional requirements. It is contended that where

Congress is enacting a statute which affects property rights of an individual the standards must be more specific than where, for example, the Congress is licensing an individual to do that which, prior to the enactment the individual could not do. In the second act the character of the factors affords no canalization of the acts of the administrative agencies, by which the Congress, the courts and the public can determine whether the agencies have kept within the mandate of Congress. In the second act the very factors set forth demonstrate that the Congress has abdicated the legislative powers conferred exclusively upon it by the Constitution. The factors named in the second act make the administration of that act as uncertain as the absence of any standards in the first act.

II.

Under Point II appellant asserts that both statutes are in violation of Article III, Sections 1 and 2 of the Constitution of the United States, defining the judicial power of the United States and vesting in the Courts of the United States exclusive jurisdiction in all cases and controversies therein named. Under this subsection it is asserted that both the first and second acts violate this Article of the Constitution, in that by the statutory provisions all judicial cognizance of the demands are taken from the courts and vested in administrative agencies. Under the first act the determination of the Secretary was final. No form of review of his determination was provided either before an administrative agency or a court. In the second act there appear four provisions which, if valid, effectively bar constitutional courts from any determination of this controversy between the Government and the individual. Those provisions are as follows:

1. Section (c) (1) provides that in the absence of the

filing of a petition in The Tax Court, as provided by (e) (1) the order of the Board shall be final and conclusive and shall not be subject to review by any court or agency.

2. Sections (e) (1) and (e) (2) grant to contractors, aggrieved by the determination of excessive profits made by the Board or the Secretary, the right to file a petition for redetermination in The Tax Court of the United States.

3. Section (e) (1) also provides that upon the filing of such petition The Tax Court shall have exclusive jurisdiction to redetermine the amount of excessive profits determined by the Board to be due and such determination shall not be reviewed or redetermined by any court or agency. Section (e) (2) by reference, in terms accomplishes the same result as to determinations which had been made by the Secretary under the first act.

4. Section (e) (1) also provides that the filing of the petition shall not operate to stay the order of the Board under (c) (2), that being the section giving the Board power to make its determination. Section (e) (2) by reference makes the same provision applicable to the orders of the Secretary under the first act.

In short, the acts, in terms, provide that the demand of the Government against a citizen shall not be tried in any constitutional court. If no petition for redetermination is filed, the determination of the Board or the Secretary is final and shall not be reviewed by any court. If a petition for redetermination is filed, The Tax Court shall have exclusive jurisdiction and its determination shall not be reviewed by any court. The Tax Court of the United States is a part of the executive branch of the Government and it does not have, nor can Congress vest in it, the functions of the judiciary. These sections of the statute deny to the judicial branch of government cogni-

zance of those matters which, in their nature, belong exclusively to constitutional courts. The framers of the Constitution made the judiciary independent that it might stand as a safeguard between the legislative or executive branches of the Government and the people. It was never intended that the Government could, as was done here, deprive an individual of property, without obtaining judgment or decree in a constitutional court. It is respectfully asserted that this type of claim for money, not taxes, must be determined in a constitutional court, and cannot be determined by an administrative agency. Illustrative of the hardship of any other rule are the facts in this case. The appellant pursuing its alleged "remedy" in The Tax Court, has exactions made against it before any determination is made in The Tax Court, and is then told that the equity courts of the United States cannot afford protection against the demands of the executive department of Government because the Congress so stated. Great as may be the powers of the Congress or of the Executive, they still can not take away from the individual the protection of the courts, established and guaranteed by the Constitution.

III.

Under Point III appellant asserts that both acts violate the Seventh Amendment to the Constitution of the United States which assures to the individual a trial by jury in suits at common law where the amount in controversy exceeds Twenty Dollars.

From the literature surrounding the adoption of the Constitution and the first ten amendments it appears that the colonists were not satisfied alone with the provision for an independent judiciary. They demanded an amendment assuring to themselves the right of trial by jury in

civil cases. This demand was embodied in the Seventh Amendment. The claim of the Government considered here is a claim for money, not taxes. The only legal mode of the enforcement of such a claim is by resort to a court of law. No legislation enactment can transfer the property of an individual to the Government without payment therefor. If this alleged claim of the United States is cognizable only in a court of the United States, then in such a case appellant is entitled to a trial by jury, guaranteed by the Seventh Amendment.

IV.

Under Point IV it is asserted that both acts violate the due process clause of the Fifth Amendment to the Constitution of the United States.

It is first asserted that both acts are invalid because they do not afford appellant a trial in a constitutional court.

It is next asserted under this subsection that the failure of both acts to provide some form of judicial review of the determination of the War Contracts Price Adjustment Board and of the redetermination of The Tax Court, violates the due process clause, since, regardless of what it may be called, the claim asserted by the Government is claim for money against a citizen, in the determination of which the citizen is entitled, if not to a regular trial in a constitutional court, to at least a review of the matters in issue by a constitutional court. It is also asserted under this point that the very provisions of the act, purporting to deny to this Court the right to determine the constitutionality of the acts are, independently of all other reasons a denial of due process.

It is next asserted that the denial of due process is

apparent from an appraisal of the totality of the facts in this case. Both acts are again reviewed to demonstrate that the acts and the individual sections constitute a denial of fundamental fairness shocking to a universal sense of justice.

In the argument on the totality of the facts attention is directed to the first and second acts separately. Under the first act, Section 403 (b) and 403 (c), contracts not in excess, in the aggregate, of $100,000 were exempt. Under the second act, Section (c) (6), contracts not in excess, in the aggregate, of $500,000 were exempt. Under the first act, Section 403 (i) (1) contracts for the products of a mine, well or mineral deposit not processed beyond the first stage, were exempt. Under the second act, Section (i) (1), the same exemption was repeated and four other exemptions were added. Under the first act, Section 403 (i) (2), the Secretary was given the right to exempt other contracts. Under the second act, Section (e) (4), the Board was given power to exempt other contracts falling into six named classes. There appears no logical basis for the lack of uniformity, either in the amount or in the classification, and it is asserted that the classification is entirely arbitrary and of the type condemned by this Court.

Section 403 (c) (1) of the first act provides for the operation of the statute when the Secretary shall be of the opinion that excessive profits have been, or are likely to be, realized. The same section (c) (1) of the second act substitutes the opinion of the War Contracts Price Adjustment Board for that of the Secretary. It provides that when the Board is of such opinion the statute becomes operative. There is discussed under this caption the fact that equal prices could be charged, and equal profits realized, but in one case the statute would commence to operate because of an opinion, while in the other, where no

opinion was expressed, or an opinion expressed that excessive profits had not been realized, the statute would be inoperative.

"Excessive profits" are defined under the first act, Section 403 (a) (4), as those determined to be excessive. Under the second act, Section (a) (4) (A), substantially the same language is used but the Board is directed to take into consideration seven named factors, all of which factors are subjective only. It is then asserted that neither act contains definite standards for the guidance of the agency as required by the decisions of this Court.

Under the first act, Section (c) (1) excessive profits could be determined only upon agreement of the Secretary with the contractor. The Secretary of War ignored this provision of the act and made his own determination when the contractor refused to agree. Under the second act, Section (c) (1), the Board was directed to invite the contractor to a conference, but if the contractor failed to acquiesce in the opinion of the Board, the Board was authorized to enter an order determining the amount of excessive profits. The necessity of an agreement vanished. Under the language of the first act, there was no provision for any review or appeal. The second act contained provisions for a redetermination in The Tax Court of any determination made by the Secretary under the first act, and for redetermination of any determination made by the Board under the second act. Sections (c) (1) and (e) (1) of the second act, in terms, divested courts of any jurisdiction to protect the contractor or subcontractor. The sections mentioned above conferred only a sterile right to file a petition. Although the petition may ultimately lead to a redetermination of a lesser amount of excessive profits or none, by The Tax Court, collection of money due to the contractor or subcontractor may be made by the administrative agency pending the redetermination, by

directing customers of subcontractor to pay money owed it into the Treasury of the United States. This collection is made upon a determination of the War Contracts Price Adjustment Board before any hearing has been accorded. The order is based upon data which at least in part, the contractor or subcontractor has never seen. There is no provision in either of the acts to refund to contractor or subcontractor any money which may have been paid into the Treasury of the United States in the event the acts are invalid, or if valid, to refund the difference between the Board's determination and the amount determined by The Tax Court to be due.

Appellant contends that the acts are repugnant to the due process clause of the Fifth Amendment insofar as they are retroactive.

The first act, passed April 28, 1942, purports to apply to all contracts made prior to that date unless full payment was made prior to April 28, 1942. Appellant had numerous contracts made prior to April 28, 1942, upon which payment was made prior to and subsequent to April 28, 1942. The Board treated all the sales of appellant regardless of the date of the contract, or of payment as being renegotiable. It is asserted that all contracts made prior to April 28, 1942, are not subject to diminution by any subsequent statute. The second act, enacted February 25, 1944, purports to apply to all contracts, to the extent of the amounts received therefrom in any fiscal year ending after June 30, 1943, whether such contracts were made on, after or prior to February 25, 1944. (Section (c) (6))

Appellant contends that the second act enacted February 25, 1944, cannot apply to appellant's fiscal year 1943, which had ended November 30, 1943. It is also asserted that any sales upon contracts made prior to April 28, 1942, are not subject to renegotiation under either act.

Appellant contends that the totality of the facts in this case demonstrate that in the administration of the acts, appellant has been dealt with in a manner which shows a denial of fundamental fairness, shocking to a universal sense of justice.

V.

All of the foregoing argument (Points I, II, III and IV) has been made upon the assumption that the renegotiation acts constitute legislation which if not invalid for the reasons heretofore given, is within the "war powers" as delegated to the Congress under Article I of the Constitution of the United States.

Under Point V appellant asserts that both acts are violative of the Tenth Amendment to the Constitution, which reserves to the States or to the people, the powers not expressly delegated to the Federal Government. It is our position that the renegotiation acts are not within the "war powers" of the Congress and cannot be supported as an exercise of such powers. It is asserted that there is no relation between the war powers, and legislation which purports to allow an administrative agency to determine the profits which a contractor may retain. In that discussion it is admitted that the power to wage war necessarily implies the power to wage war as effectively and as cheaply as possible, but a distinction is made between *cost* to the government and the *profits* which the contractor may realize. It is not contended that the government may not fix prices of war materials which it purchases, but it is contended that the control of the profits a contractor may make after selling at such prices is not within the "war powers" of the Federal Government. It is also contended that the exemption from renegotiation of contractors and subcontractors who did

not do a volume of $500,000 under the second act, or a volume of $100,000 of business under the first act, creates, not an aid to the successful prosecution of the war, but on the contrary, creates a deterrent to it. Similarly it is contended that the other exemptions specified by the acts as well as the permissive exemptions from renegotiation were not only detrimental to the successful prosecution of the war, but showed a partiality and absence of uniformity which rendered the statute invalid. It is contended that the renegotiation acts are in fact recognition of a social philosophy which may be admirable but which goes beyond the powers granted to the Federal Government.

VI.

Following the discussion of the invalidity of the two acts, it is asserted under Point VI that the appellant will suffer irreparable injury if the injunction be denied.

It is admitted that unless the injunction issue, appellees will exact from customers of appellant $270,000 in addition to the $204,000 already exacted. This additional amount will be exacted before The Tax Court shall have passed upon either the determination of the Secretary for 1942, or of the Board for 1943, and before any determination is made by this Court, as to the constitutionality of either act. The deprivation of $474,000 to a small company whose total sales in 1943 were only $3,500,000 constitutes a serious impairment of its working capital. In addition the acts contain no provision for the recovery of said sum in the event the acts be determined to be unconstitutional, or if determined to be constitutional that it subsequently appear by the action of The Tax Court that the determination made by the Secretary in 1942, and by the Board in 1943, were greater than they should have been.

In addition to there being no provision for recovery, there is no recovery procedure established, and there is no provision for the payment of interest to appellant.

If appellant be correct in all its contentions, unless the injunction be granted, appellant must see its working capital diminished by $474,000, must then await action by The Tax Court (it has now waited over two years on the 1942 petition) and must then determine at its own risk and without any statutory authority, a procedure for the recovery of the funds unlawfully collected. In addition even if successful, it cannot be assumed that funds will be appropriated for repayment, or if appropriated, provision will be made for the payment of interest.

The District Court determined that equity has no jurisdiction because of the adequacy of three alleged remedies, (a) the petition in The Tax Court, (b) suit in the Court of Claims, and (c) suits against the customers of appellant who have made or will make payments upon the direction of appellees.

From what has been said before it is apparent that the suggested "remedy" by petition in The Tax Court is wholly inadequate. In fact, it is a hindrance rather than a help. It does not, and cannot restrain collection. It does not permit the entry of an order that the funds so collected shall be repaid. It does not permit a determination by this Court of the constitutionality of the acts, which this Court alone can determine. In connection with the "remedy" by petition in The Tax Court, it has been asserted by appellees that until the administrative remedy be exhausted no other procedure can be invoked. This assertion fails to recognize that the doctrine of the exhaustion of administrative remedies has no application to the kind of a case where the impact of the statute is felt before the administrative procedure has

run its course and issued its final command. It also ignores the fact that appellant has already done all that it can do with the administrative remedy; has in fact exhausted it, and that further action in that direction can be only submission to the agency's orders.

Appellant does not have any remedy, adequate or otherwise, in the Court of Claims. There is no statutory provision for a remedy in that court, but there is an express statutory provision in the acts themselves precluding the Court of Claims, or any other court, except The Tax Court from acting in renegotiation matters. There is no general power in the Court of Claims to decree the payment of interest. Even if there should be a right in the Court of Claims by which appellant could recover the amounts illegally collected, that right could only be exercised *after* The Tax Court shall have made its determination of excessive profits, if the acts be constitutional, or *after* the decision in this Court that the acts are or either of them is unconstitutional.

Appellant does not have any adequate remedy by suits against its customers for the amount they may be requested to pay into the Treasury of the United States. This so-called "remedy" is worse than the injury it is supposed to cure. Under this suggestion, *after* appellants' customers have complied with the orders of the Under Secretary of War or the Board, and have paid into the Treasury of the United States the amounts demanded, they must be sued by appellant for the amounts so paid, to test the constitutionality of the acts.

These customers did not deny their indebtedness to appellant, and would have paid it except for the orders of the Under Secretary of War. They are, however, opposed to any procedure by which they are made defendants in a suit in which they have no interest, solely because in such a procedure the validity of the acts of others may

be determined. Suing them will result in the discontinuance of business with appellant.

If the appellees' actions were erroneous, or if the acts are unconstitutional, such issues can be determined in this suit between appellant and appellees without requiring disinterested persons to become involved, to the further injury of appellant.

In addition to the destruction of business relations, the suggested application of this remedy overlooks the number of suits required, the costs and expenses which appellant will be forced to incur, and the time lost by appellants' executive and clerical staff in suing its several customers.

ARGUMENT.

I.

THE FIRST AND SECOND RENEGOTIATION ACTS VIOLATE THE PROVISIONS OF ARTICLE I, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES.

Article I, Section 1 of the Constitution of the United States provides as follows:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

It is recognized that this power admits the enactment of laws having reasonably broad scope, outlining the legislative policy, or the end to be achieved, and leaving to the agency to which the administration of the act is committed the power to fill in the details. It is also recognized, as this Court said in *Addison* v. *Holly Hill Co.*, 322 U.S. 607, that the wider a delegation is made by Con-

gress to an administrative agency, the more incomplete is a statute, and therefore the ampler the scope for filling in the details. This does not mean, however, that there need be no definite standard or guide for the action of the administrative agency. As is illustrated by the decisions of this Court, the nature of the standards must depend upon the function of the legislation, and its effect. Numerous cases have been before this Court in which attacks have been made against the validity of the legislation because of the lack of adequate standards. The nature of the legislation and the character of the standards varies so widely that but little direct comparison can be made. In *Panama Refining Co.* v. *Ryan*, 293 U.S. 388; *Schechter Corp.* v. *United States*, 295 U.S. 495; *Carter* v. *Carter Coal Co.*, 298 U.S. 238 and *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, the standards were held to be inadequate. In each of those cases, the statute or portions thereof under consideration were held to be unconstitutional. In *United States* v. *Rock Royal Co-op.*, 307 U.S. 533; *Mulford* v. *Smith*, 307 U.S. 38; *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, and *Yakus* v. *United States*, 321 U.S. 414, the standards or guides were held to be adequate. In those cases the statute under consideration or the portions attacked were held to be constitutional.

This Court has consistently taken the position that the function of the law questioned, determines to a great extent the character of standards required. Where the court has dealt with a statute which involves the granting of congressional sanction, this court has been liberal in its requirements in respect of standards. Thus, where the act deals with matters regarding licenses, which could be and historically were granted by Congress out of hand, there seems little reason why a standard more specific than the "public interest" should not satisfy the constitutional requirement. This principle is illustrated by the

cases of *N. Y. Central Securities Co.* v. *U. S.*, 287 U.S. 12 (unification of control of railroads), *National Broadcasting Co.* v. *U. S.*, 319 U.S. 190 (control of broadcasting) and *United States* v. *Grimaud*, 220 U.S. 506 (use of public domain). *Hampton & Co.* v. *United States*, 276 U.S. 394 (imports). *American Power & Light Co.* v. *Securities and Exchange Commission*, 328 U.S.—(decided November 25, 1946) 15 LW. 4013)

When, however, the Court is dealing with matters which relate to the liberty or the property of an individual, it has taken a very different position. In those cases, this court has always held that the standards required should be consonant with the inviolability of the rights involved and has required that standards of objectivity be set forth which ensure that the administrative agency cannot act on its own whim. This principle is illustrated by the following cases: *United States* v. *Cohen Grocery Co.*, 255 U.S. 81; *Carter* v. *Carter Coal Co.*, 298 U.S. 238; *Schechter Corp.* v. *United States*, 295 U.S. 495; *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 and *Yakus* v. *United States*, 321 U.S. 414.

Much of the great legislation which has been passed since the early 1930's, and which relates to property rights has provided (in addition to affording court review) objective standards which could and did keep the administrative agency canalized in the administration of the act so that the "Congress, the courts and the public", could ascertain from examination of their proceedings and their determinations whether they have kept within the Congressional mandate. *Addison* v. *Holly Hill Co.*, 322 U.S. 607. Whenever the Congress gave to an administrative agency which dealt with liberty or property "a roving commission" or did not provide objective standards, this court, consonant with its privilege and duty to safeguard

the individual in protecting his liberty or his property has either struck the statute down or so construed it that the individual could be assured due process of law. (*Panama Refining Co.* v. *U. S.*, 293 U.S. 388; *United States* v. *Cohen Grocery Co.*, 255 U.S. 81; *Carter* v. *Carter Coal Co.*, 298 U.S. 238). This is particularly true if the statute in question makes no provision for court review. (*American Power & Light Co.* v. *Securities and Exchange Commission*, 328 U.S. ..., (decided November 25, 1946) 15 LW. 4013, 4017.

If any general summary can be made as to whether the delegation of power to an administrative body is within the limits required, such summary would present three requirements.

First: There must be a definite statement of the legislative policy or purpose in the act, or determinable from it.

Second: If the operation of the act is dependent upon the existence of certain ascertainable facts, there must be a statement in the act setting forth the facts upon the occurrence of which it shall become operative.

Third: The act must prescribe methods to be followed by the agency to which the administration of the act is entrusted, by which Congress, the courts, and the public can determine whether the agency has acted within the limits prescribed by Congress.

In the light of the foregoing observations both acts are lacking in all of the essentials.

(A) The First Act, Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

Before discussing the constitutionality of the first act, it is pointed out that appellant does not agree with the construction placed upon the first act by the Secretaries. As construed by them, the first act permits them, in the absence of agreement as to excessive profits, to make a "unilateral" determination. Notwithstanding our contention that the plain words of the act authorizes nothing, in the absence of agreement, but that the contractor or subcontractor be required to "renegotiate", we discuss the constitutionality of the first act as if the construction of the Secretaries is the correct one.

There is no definite statement of legislative policy or purpose contained in the act itself.

The act becomes operative upon an individual, not upon the occurrence of any ascertainable event, but when the Secretary is of the "opinion" that the profits realized or likely to be realized may be excessive. Section 403 (c) (1) provides in part as follows:

> "Whenever, in the opinion of the Secretary of a Department, the profits realized from any contract with such Department or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price."

Two contractors, one of which may be appellant, may make identical articles, charge identical prices, have identical costs, realize identical gross profits, pay identical Federal taxes and realize identical net profits, but because the Secretary is of the opinion that Aircraft's profits are excessive the statute commences operation on Aircraft. Because the Secretary is of the opinion that Contractor B

(not Aircraft) did not realize excessive profits, or because the Secretary has failed to form an opinion on the subject, the statute does not operate upon Contractor B. Nothing determines the calling of the statute into operation except "the opinion" of the Secretary. Nothing in the statute controls the opinion of the Secretary. This type of legislation, where the operation of the statute was dependent upon an opinion without factual basis therefor, was held to be unconstitutional in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388; *Wichita Railroad & Light Co.* v. *Public Utilities Comm'n*, 260 U.S. 48, 59; *Mahler* v. *Eby*, 264 U.S. 32, 44.

The statute is now in operation as to Contractor A (Aircraft) but not in operation as to Contractor B. As to Contractor A, the Secretary is directed to eliminate any excessive profits. What are the excessive profits to be eliminated? Section 403 (a) (4) provides as follows:

> "The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

Appellant has never been a party to any agreement with the Secretary or any delegate thereof, recognizing that any portion of its profits have been found as a result of renegotiation to represent excessive profits. Appellant has consistently maintained that it realized no excessive profits. As the act is construed by the Secretaries, the determination of a realization of excessive profits may be made solely by the Secretary. The Secretary's uncontrolled opinion brought the act into play. The Secretary's uncontrolled opinion alone determined the amount of excessive profits. No standard, guide, factor or other yard stick for that determination is provided in the act. This is more than allowing the administrative agency "to fill in the details." This is transferring to the administra-

tive agency the legislative functions of the Congress of the United States. Undefined, unrestricted and subject to no form of review, it represents the complete abdication by Congress of the legislative functions vested in the Congress by Article I, Section 1 of the Constitution of the United States.

Assuming that this court could agree as to what Congress meant when it used the words "excessive profits" and the contention was made that the Secretary did not properly construe the Act, there is nothing in the act or in the Secretary's proceeding by which this court could determine whether the Secretary had kept within the act.

It was under this act that $204,000 of appellant's funds were paid into the Treasury of the United States by debtor customers of appellant pursuant to the order of the Secretary of War.

(B) The Second Act, the Renegotiation Act.

On February 25, 1944, the Renegotiation Act was passed, as a part of the Revenue Act of 1943. It purports to apply to appellant's fiscal year 1943. This act while attempting to correct some of the glaring deficiencies of the first act likewise fails to satisfy the requirements of Article I, Section 1 of the Constitution of the United States.

Neither in the Revenue Act of 1943, or in the section designated as the Renegotiation Act, is there any statement of legislative policy.

This act is effective as to a particular individual, not upon the occurrence of any ascertainable event, but whenever the War Contracts Price Adjustment Board is of the "opinion" that the amounts received or accrued under

contracts may reflect excessive profits. Section (c) (1) of the Renegotiation Act provides in part as follows:

> "Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding."

The statute commences to operate not upon the happening of an event, not upon any definite objective, but when the Board is of the opinion that the amounts received or accrued upon contracts may reflect excessive profits. Again, two contractors may make identical articles, charge identical prices, have identical costs, realize identical profits, before and after taxes, but because of the opinion of the Board the statute operates only upon Contractor A (Aircraft) and not upon Contractor B.

This act provides, Section 403 (c) (1) that if the Board does not make an agreement with the contracter for the elimination of excessive profits, the Board shall issue and enter its order determining the amount of such excessive profits and give notice thereof to the contractor. Gone now is any pretense of real renegotiation. If no agreement is reached the Board makes an order determining the amount of excessive profits. The Board may request an agreement, but if the contractor does not accept the determination of the Board, whatever it may be, it is immaterial. The Board then issues its order determining the amount which in its opinion represents excessive profits and then proceeds to collect this amount from customers of the contractor.

But recognizing one of the glaring deficiencies of the first act, and in so recognizing it, admitting its invalidity, the Renegotiation Act purports to contain seven factors to be taken into consideration in determining excessive profits. Section (a) (4) (A) provides:

> "(4) (A) The term 'excessive profits' means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:
>
> (i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;
>
> (ii) reasonableness of costs and profits, with particular regard to volume of production, normal prewar earnings, and comparison of war and peacetime products;
>
> (iii) amount and source of public and private capital employed and net worth;
>
> (iv) extent of risk assumed, including the risk incident to reasonable pricing policies;
>
> (v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;
>
> (vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turnover;
>
> (vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted."

None of the foregoing factors is objective. There is no definite starting point and even after starting there is no guide. In *Standard Chemicals & Metals Corp.* v.

Waugh Chemical Corporation, 131 N.E. 566, 567, discussing the Lever Act, Mr. Justice Cardozo said:

> "The act, as the Supreme Court construes it, rejects all objective standards, all determinate or determinable criteria, the tests of practice or precedent or the market or the vicinage. Rejecting these, it sets the individual adrift upon the uncharted sea of subjective prejudice and favor."

How aptly that observation applies to the Renegotiation Act.

This act, while purporting to supply standards, supplies only vague and indefinite words, under which neither the court, the individual, nor the Congress could determine whether the agency had kept within the congressional intent, if the Congressional intent could be determined.

It is under this statute that appellees assert that they will take an additional $270,000 of appellant's funds.

In a consideration of both acts, it may be asserted that excessive profits are incapable of more exact determination. If such contention be made, it will be an admission of the absence of any standards in the first act. It will also, be an admission that the alleged standards in the second act are insufficient and fatally defective. But a contention that the words "excessive profits" are incapable of a better definition is unsound. In the Internal Revenue Code, sections 713 and 714, a tax is imposed upon excess profits and neither the Government, the tax payer, nor the courts have had any great difficulty in applying the formula contained in that act. Average earnings over the base period which are not subject to excess profits tax have an exact and certain meaning. Earnings above the average earnings for the base period are defined as excessive profits and are taxed as such. The Internal Revenue Code also provides that in determining excess

profits one may use a percentage of the average invested capital over the base years. No difficulty has been encountered in determining excess profits under this second formula.

The two formulae in the Internal Revenue Code are generally well understood and they could have been used in determining excessive profits under the Renegotiation Act. In their use, there would have been no uncharted seas on which the administrative agency was cast adrift. If variations from the fixed formula were desirable, resort could have been had to similar language as that contained in the relief section, Section 722, of the Revenue Code, pertaining to special circumstances. The use of either formula, however, would have produced and insured a definite result, from which additions to, or deductions from, could easily have been made as circumstances required. The Vinson Act also provided a means of determining excess profits based upon a percentage of the profits. c. 95, 48 Stats. 503, and amendments thereto.

Failure to provide definite standards is evidence that the framers of the act intended to vest solely in the administrative agencies the absolute power of arbitrary determination of what constituted excessive profits.

But the Congress, even had it intended and desired to do so, could not abdicate its functions and delegate to administrative agencies the uncontrolled power to determine excessive profits. This delegation is expressly prohibited by the provisions of the Constitution of the United States. In *Yakus* v. *United States*, 321 U.S. 414, involving the validity of the Stabilization Act, the administrator was directed to the prices prevailing between October 1 and 15, 1941. A similar direction in the Renegotiation Act or in the prior act as to a price date, or even a period of profits, would have furnished some basis for

the determination of excessive prices or excessive profits. One could give consideration to all of the factors contained in the second act, even including the power of the Board to adopt additional factors, (factor vii) could grade the contractor 100% on each of those factors, including factor vii, and yet be without a basis for determining excessive profits. Normal or reasonable profits are not defined.

When Congress passes any act which in its terms gives to an administrative agency the power to define the extent of its own powers as it did here in directing the agency to eliminate excessive profits and defining excessive profits as those found by the agency to be excessive, it runs counter to the recognized principle of constitutional law recently stated in this language:

> "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom the authority is vested." *Addison* v. *Holly Hill Company*, 322 U.S. 607, 616.

If an endeavor be made to determine from the words themselves what the Congress meant by the use of the words "excessive profits" two possibilites are immediately suggested, first, that the Congress meant profits in excess of normal war time profits, second, that the Congress meant profits in excess of the profits which would have been realized except for war.

If the first possible meaning be considered, it is apparent that the Congress left far too much for the determination of the Board and of The Tax Court. In *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, this Court held that the language of the statute, directed against an "unjust or unreasonable rate or charge" was too indefinite to satisfy the constitutional requirements. In that case, the opinion of this Court shows that seven different judges of seven different districts had different ideas as to what con-

stituted an "unjust or unreasonable rate or charge." Yet, as is evidenced by a study of their charges to their juries, each was earnestly desiring to state the meaning of the words to properly administer the act. In the opinion of this Court (pp. 90-91) attention was also directed to the fact that administrative officers had made "persistent efforts . . . to establish a standard of their own to be used as a basis to render the section possible of execution." But neither the persistent effort of the administrative officers or the earnest desires of the several judges could overcome the indefinite language used in the act.

In *Weeds, Inc.* v. *United States,* 255 U.S. 109, 110, 111, this court considered an indictment which charged a conspiracy to exact "excessive prices." In deciding that case on the authority of the *Cohen* case, this court said:

> "As the only difference between the charges in the *Cohen Grocery Co. Case, ante,* 81, and those in this is the fact that here, in one of the counts, there was a charge of conspiracy to exact excessive prices, it follows that the ruling in the *Cohen Case* is decisive here unless the provision as to conspiracy to exact excessive prices is sufficiently specific to create a standard and to inform the accused of the accusation against him, and thus make it not amenable to the ruling in the *Cohen Case.* But, as we are of the opinion that there is no ground for such distinction, but, on the contrary, that the charge as to conspiracy to exact excessive prices is equally as wanting in standard and equally as vague as the provision as to unjust and unreasonable rates and charges dealt with in the *Cohen Case,* it follows, for reasons stated in that case, that the judgment in this must be reversed and the case remanded with directions to set aside the sentence and quash the indictment."

If, however, the opinions of the Court in the *Cohen Grocery Co.* case and in the *Weeds, Inc.,* case, holding the

words "unjust or unreasonable rate or charge" and the words "excessive prices" to be too indefinite, be rejected, for the reasons given by Mr. Justice Pitney and Mr. Justice Brandeis, additional difficulties are encountered. Mr. Justice Pitney and Mr. Justice Brandeis found no difficulty in determining what excessive prices were. Mr. Pitney said: (p. 112)

> "In the absence of a statutory definition of, or method of determining, standard prices, with which to compare the prices alleged to be excessive, the natural standard, according to which this provision of the act ought to be interpreted, is that adopted in the ordinary transactions of men, and adhered to by the common law time out of mind—the standard of fair market value: the price prevailing under current conditions of supply and demand, uninfluenced by manipulation."

The statute in those cases referred to *excessive prices*, and Mr. Pitney and Mr. Brandeis were of the opinion that by using such language excessive prices, Congress meant those which exceeded, the fair market value—the price prevailing under current conditions of supply and demand, uninfluenced by manipulation.

But the renegotiation acts reject standards which "have been adhered to by the common law time out of mind—the standard of fair market value." The renegotiation acts reject any and all determinative standards.

If, as appears from the foregoing decisions the terms "excessive prices" are so lacking in specificity as to render them violative of Article I, Section 1 of the Constitution, the term "excessive profits" cannot be said to have the requisite specificity. So far as we are aware, unlike the situation which Mr. Justice Pitney described, in respect to "excessive prices," there is no standard which may be borrowed from the common law in respect of what "ex-

cessive profits" are. Certainly the acts do not purport to borrow such standard from the common law.

Considering the second possibility, that the Congress meant by the term "excessive profits", those profits in excess of the profits the contractor would have earned, if there were no war, it is sufficient to say that this assumption would necessarily render the renegotiation acts unconstitutional on the authority of *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, in which this Court said, speaking through Mr. Justice Holmes: (pp. 223, 224)

> "To divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess."

In the case of *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, the court was dealing with the subject of prices. If divining prices prophetically exacts "gifts mankind does not possess," it can be said that any attempt to divine what "excessive profits" might have been under conditions which do not exist, requires no lesser gifts. Obviously this is true because the term "profits" alone involves many matters not involved in the establishment of prices.

Whatever assumption or assumptions be made as to the intent of the Congress in use of the terms "excessive profits," the fact is that there are no standards for the determination. If the first act should be construed, as the Secretaries have construed it, the only plausible explanation for the arbitrary provisions in the acts is that they were intentionally drafted so that no standard was required, except the individual will of the renegotiator. That was made plain in the hearings on the bills in Congress from which the second act emerged. Mr. Maurice Karker, representing the War Department before the

Ways and Means Committee said that the factors taken into consideration by the War Department in renegotiation were "multitudinous". (p. 72, Renegotiation of War Contracts, Hearings before the Committee on Ways and Means, House of Representatives, Seventy-Eighth Congress, First Session on H.R. 2324, 2698 and H.R. 3015, etc.) On page 108 of the same report of these hearings, Mr. Karker, stated that there were no means of determining what excessive profits are except the judgment of the man who is handling the job, and that the determination of excessive profits was a personal judgment, not according to any statute or formula.

Attorneys for the appellees, in the court below stated: (page 20 of their brief)

> "The statute as thus enacted did not contain any detailed definition of excessive profits nor any formula pursuant to which the computation of excessive profits was to be made. The determination was to be by an exercise of judgment by the administrative officers."

It will be observed that the appellees propose to deprive the appellant of its property, not upon any statement of law, but upon their own individual judgment.

In the case of *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89, this court said:

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words 'That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or

definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

If it be suggested that these decisions cited above apply only to criminal cases, attention is directed to the fact that the principles of those cases were reaffirmed by this Court in civil cases. *United States* v. *New River Collieries*, 262 U.S. 341; *Davis* v. *Newton Coal Co.*, 267 U.S. 292; *Small* v. *American Sugar Ref. Co.*, 267 U.S. 233.

The observation, made in the *Cohen* case, while in part aptly describing the renegotiation acts, falls short in the final analysis of such acts. The renegotiation acts do not require that the profits be found to be excessive "in the estimation of the court and the jury." Both the court and the jury are denied to the contractor. Only the opinion of the Board is necessary.

It is respectfully submitted that no law depriving a citizen of his property has ever received the sanction of this court where the action of the statute is dependent upon the opinion of an agency that the statute shall operate.

It is also respectfully submitted that no law depriving a citizen of his property has ever received the sanction of this court where the extent of the operation of that statute is dependent solely upon the unrestricted opinion of an administrative agency.

This is delegation running riot as was said by Mr. Justice Cardozo in *Schechter Corp.* v. *United States,* 295 U.S. 495, 553.

II.

THE ACTS, VIOLATE THE PROVISIONS OF ARTICLE III, SECTIONS 1 AND 2 OF THE CONSTITUTION OF THE UNITED STATES.

Article III, Sections 1 and 2 of the Constitution of the United States provide in part as follows:

> "Section. 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
>
> Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

A statute which vests in the Executive Branch of Government the right to determine that money, other than for taxes, is due from a citizen to the United States, and also vests in the Executive Branch the right to collect the money so determined to be due, by ordering debtors to pay money due such citizen to the Treasury of the United States, without a judgment or decree therefor, violates these sections of Article III. Such a statute divests

the Judicial Branch of the powers and of the duties conferred and imposed upon it.

This statement does not contemplate that in all matters between the citizen and the Government there must necessarily be an invocation of judicial power. The statement does contemplate that in the matter of money demands, not taxes, between the citizen and the Government, which traditionally were matters for judicial determination, there shall be a judicial determination of the validity of the demand, before such claims can be enforced.

Volumes have been written as to the desires of the framers of the Constitution to establish a strong and independent judiciary. The purpose has been stated and restated, but always to the same effect, namely that the Judicial Branch of Government was to afford to the individual the protection against the demands of the Executive Branch or of the Legislative Branch of Government. Traditionally certain matters were the subject only of judicial power and the colonists intended that they should always remain so, but to assure to themselves and to us, that no change could be made, they provided expressly that the judicial power should be vested solely in the courts. Even this provision was not regarded as sufficient. The judicial power was expressly defined as extending to all cases in law, in equity, in admiralty and in maritime jurisdiction. This was not sufficient. The judicial power was to extend to controversies to which the United States and a citizen should be a party. Nothing was to be changed: that which traditionally belonged to the Judicial Branch was to remain so, free from Executive or Legislative encroachment.

In Number LXXVIII of the Federalist we find the following (p. 577):

> "It is far more rational to suppose, that the courts were designed to be an intermediate body between the

people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."

In Number LXXX of the Federalist, Hamilton considered the various cases subject to the judicial authority. Speaking of the third class of cases enumerated by him, those to which the United States shall be a party, he said, Federalist (p. 588):

"Still less need be said in regard to the third point. Controversies between the nation and its members or citizens, can only be referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum."

Again, Madison writing Number XLVIII of the Federalist, said (p. 382):

"It is agreed on all sides, that the powers proper belonging to one of the departments ought not to directly and completely administered by either of the other departments."

Jefferson, in "Notes on the State of Virginia," (p. 195) after pointing out that the "powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others," observed that there was no barrier provided by the Virginia Constitution between the several powers. He pointed out that the executive and judicial powers were dependent on the legislative for their subsistence in office and that "They (the legislative branch) have . . . *decided rights* which should have been left to *judiciary controversy.*"

Hamilton said in Number LI of the Federalist (p. 399):

"In republican government, the legislative . . . predominates."

After observing that a remedy for this was to divide it into two branches, he went on to say:

> "It may even be necessary to guard against dangerous encroachments by still further precautions."

In *O'Donoghue* v. *United States*, 289 U.S. 516, 532, Mr. Chief Justice Marshall, is quoted as saying in the debates in the Virginia State Convention 1829-1830, (pp. 616-619):

> "The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all."

This court has given recognition to the intentions and desires of the framers of the Constitution. In 1855 this court announced that situations exist wherein it was not permissible for the Congress to abrogate the powers of the Judicial Branch of Government by withdrawing from it any subject matter which has always been within its cognizance.

In *Murray's Lessee* v. *Hoboken Land*, etc. 18 How. 272, (1855) where the Treasury Department levied upon the lands of a defaulting tax collector and sold his property to pay his defaults, this Court upheld the procedure but was careful to limit its decision to the facts of that case as involving tax collectors. It said, (p. 284):

> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

In *O'Donoghue* v. *United States*, 289 U.S. 516, it was also said: (p. 530)

> "The Constitution, in distributing the powers of

government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer* v. *Philippine Islands*, 277 U.S. 189, 201, namely, to preclude a commingling of these essentially different powers of government in the same hands. And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another."

In *Crowell* v. *Benson*, 285 U.S. 22 (1931) in discussing the Longshoremen's Compensation Act and in determining that the Act did not divest the Court of its power over those matters which were traditionally matters for determination by the constitutional courts, this Court said: (pp. 56, 57)

"In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Execu-

> tive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

Admitting then that there are situations wherein the Congress cannot "sap the judicial power" it would appear that a situation wherein the Executive Branch of Government seeks to take money (not taxes) from an individual, without action in the courts, should stand at the head of all cases to which this principle applies.

But one is not required to speculate about this. In *Kilbourn* v. *Thompson*, 103 U.S. 168, 193, this Court said:

> "If the United States is a creditor of any citizen, or of any one else on whom process can be served, *the usual, the only legal mode of enforcing payment of the debt is by a resort to a court of justice.* For this purpose, among others, Congress has created courts of the United States, and officers have been appointed to prosecute the pleas of the government in these courts." (Emphasis ours.)

Here is judicial recognition of the express prohibition against the United States attempting to enforce payment of a money claim against a citizen in any manner except in a constitutional court.

The principle which we have asserted is founded upon the decisions of this court. It remains, then, only a question as to whether the two renegotiation acts violate that principle.

Under the provisions of the first act, the Under Secretary of War, purporting to act as delegate of the Secretary of War, made a unilateral determination that during the fiscal year 1942, appellant had realized excessive profits

of $775,000. Following this determination, the Under Secretary directed the payment of $204,000 by customers of appellant into the Treasury of the United States and such sum was so paid into the Treasury of the United States.

Under the provisions of Section 403 (c) (1) of the Renegotiation Act the War Contracts Price Adjustment Board entered an order, determining that during the fiscal year 1943 appellant realized excessive profits of $1,265,000. It is admitted that the War Contracts Price Adjustment Board would direct payment by customers of appellant into the Treasury of the United States of $270,000 except for this suit.

Until the enactment of the Renegotiation Act, (February 25, 1944) *no* provision was made to review in courts or elsewhere, determinations made by the Under Secretary acting as a delegate of the Secretary. Following the enactment of the Renegotiation Act, authorizing the filing of petitions for redetermination in The Tax Court, the appellant filed, in The Tax Court, its petitions for redetermination for each of the years 1942 and 1943, and said petitions are each still pending. (R. 136, 142)

The Renegotiation Act provides Section (e) (1):

> "Upon such filing (of a petition in The Tax Court) such Court (The Tax Court) shall have exclusive jurisdiction by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." (Insertions ours)

The Renegotiation Act further provides, Section (e) (1), that the filing of a petition in The Tax Court shall not operate to stay the execution of the order of the War Contracts Price Adjustment Board.

The Tax Court of the United States is not a court. It is not a part of the Judicial Branch of Government. It is "an independent agency of the Executive Branch of the Government" (Section 1100, Chapter 5, Title 26 U.S. Code 1945, Appendix 131); *Hutchings-Sealy Nat. Bank* v. *Commissioner*, 141 Fed. 2d 422. It is not a reflection on the skill, ability or the integrity of the Tax Court to deny to it jurisdiction of a case of this character. The question revolves around the provisions of the Constitution, not upon the qualities of The Tax Court. This Court has so held in a similar situation. Speaking of legislative courts, Mr. Chief Justice Marshall, in the case of *American Insurance Co.* v. *Canter*, 1 Pet. 511, (p. 545, erroneously marked 321), said:

> "These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it."

Under both renegotiation acts, the Courts of the United States are denied the right to consider either the validity of the statute which provided the basis for the claim, or the merits of the claim as made. Under both statutes the courts of the United States are closed to the citizen who opposes the demands of the executive agency, regardless of the invalidity of the statute, or the impropriety of the demand, unless the Government itself elects to institute suit against the contractor, rather than to direct customers of the contractor to make payment into the Treasury. Under both statutes the Legislative Branch of Government determined the constitutionality of the statutes, and the Executive Branch of Government determined the amount alleged to be due.

What magic surrounds "renegotiation" that allows the Executive Branch to usurp the traditional and constitu-

tionally imposed functions of the Judicial Branch? War is neither an excuse nor a reason for suspending the constitutional provisions. *Schechter Corp.* v. *United States,* 295 U.S. 495, 528. Renegotiation is only a statutory procedure by which an executive agency, purporting to act under the statute which created it, demands that appellant pay into the Treasury of the United States a sum of money which in the opinion of that agency is due the United States, and which indebtedness appellant denies. The amount alleged to be due is not a tax levied by the Congress of the United States. Since the demand is not for taxes, it must arise upon some theory of contract express or implied, or upon some theory of a tort committed by appellant. Demands for money due the United States upon a contract express or implied to which it is a party, are matters for cognizance of courts. Demands for money due the United States by reason of a tort committed against it are also matters for cognizance by courts. The only legal mode of enforcing payment of money due the United States, other than for taxes, whether it be for a tort or upon a contract, is by resort to a constitutional court. *Kilbourn* v. *Thompson,* 103 U.S. 168, 193.

The claim and the means of collection as established by the renegotiation acts, presents the identical situation which caused Article III, Sections 1 and 2 to become a part of the Constitution. It was intended to assure to the citizen the safeguard of judicial power. The citizen needs that safeguard most when the Government, or its agents propose to deprive him of his property.

This Court recently recognized that judicial power extends to certain cases without limitation. In *Stark* v. *Wickard,* 321 U.S. 288, 310, this Court said:

> "But under Article III, Congress established courts to adjudicate cases and controversies as to claims of

infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."

We think the matter here in controversy is best resolved in the case of *Moore* v. *Robbins*, 96 U.S. 530, where the Government acting through the Department of Interior issued a patent to one Moore. After its issuance, the Department of Interior, believing it had made an error in issuing the patent, in terms, cancelled it. This Court held that it was not competent for the Department to cancel a patent which vested title to land in an individual. The Court said: (p. 532)

"While conceding for the present, to the fullest extent that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land-office. Not only has it passed from the land-office, but it has passed from the Executive Department of the government. A moment's consideration will show that this must, in the nature of things, be so * * *. With the title passes away all authority or control of the Executive Department over the land and over the title which it has conveyed. * * * If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course."

It may be asserted that the procedure established by the renegotiation acts for collection, by direction to customers to pay into the Treasury of the United States, does not constitute a "case" or "controversy" since there

is no proceeding in a court. Such a contention ignores the very purpose of Article III of the Constitution. Article III did not contemplate that the Executive Branch might take the citizen's property provided it could secure the property without the aid of the courts. A case or controversy involving an alleged money claim cannot be made to depend upon the filing of a praecipe or a summons in a clerk's office. The determination of whether a case or controversy exists depends upon substance, not form. *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249.

In that case, this court considered, p. 261, the meaning of the words, "case or controversy", and reviewed prior decisions. Adopting the tests as therein suggested, a case or controversy exists when the claim is asserted and the initial step is taken to enforce it. The proceeding here is between adverse parties, seeking a determination of their legal rights. Valuable legal rights asserted by the citizen and threatened with immediate invasion by the Government, will be directly affected to a specific and substantial degree by the decision. The question lends itself to judicial determination and is the kind which this Court traditionally decides. The relief sought is a definitive adjudication of the disputed constitutional right of the citizen to be free from the demand made by an executive agency. The citizen who will be deprived of property is not attempting to secure an abstract determination by the Court of the validity of a statute.

There may be no suit pending in a court, but the adoption of a procedure of adjudication nd collection which ignores the judicial power of a court, cannot change the essential nature of the proceeding.

The Congress itself in the enactment of both statutes recognized that the claim for alleged excessive profits is a case or controversy for cognizance by the Judicial

Branch of Government. Both acts provide that when the Goverment seeks *to collect* the amount of the alleged excessive profits, it *may* institute suits *on behalf* of the United States in the appropriate courts of the United States.

Section 403 (c) (2) of the Sixth Supplemental National Defense Appropriation Act, 1942, provides in part as follows:

> "The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection."

Section 403 (c) (2) of the Renegotiation Act provides, in part, as follows:

> "Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection."

In suits *on behalf* of the Government, to collect alleged excessive profits as determined by the Secretary or the War Contracts Price Adjustment Board, (where collection cannot be made by demand upon the customer) the claim presents a case or controversy and the courts of the United States are designated as the agency through which such collection shall be made. In that situation a case or controversy is admitted to exist and the judicial nature thereof is recognized. The aid of the courts is then invoked. But when the *citizen* attempts to *resist* the demands of the Executive Branch, when he opposes deprivation of his property by executive or administrative action, then the matter is asserted not to be a case or controversy which permits the citizen to invoke the judicial power of

his government. Then, and in that situation, it is asserted that the claim loses its character as a case or controversy and becomes something which is entrusted solely to the executive department.

If the framers of the Constitution were fearful of the power of an Executive or Legislative Branch, and sought to interpose a strong judiciary between the Executive and the citizen, what would have been their reaction to a statute which authorizes the Executive power to invoke the aid of the courts in assisting the Executive in the collection of its claims, which at the same time denies to the Judicial Branch the right or power to protect the citizen when he opposes such election of the Executive?

III.

THE ACTS VIOLATE THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Seventh Amendment to the Constitution of the United States provides, in part, as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. * * *"

The adoption of the Seventh Amendment was an essential part of the individual's protection against the demands of the Federal Government, which was then being created.

The framers of the Constitution were fearful of the powers which they were vesting in the Federal Government. So fearful were they that they made certain that the Constitution would not be adopted unless safeguards against the great powers were also enacted. They first demanded and obtained a judiciary as far removed from prejudice and favor as was possible. The judges must be

appointed for life, their salaries maintained at the level at which they existed at the time of appointment, and their tenures must be for life or during good behavior. But the framers of the Constitution also were fearful of independent courts. They demanded and obtained an amendment to the Constitution which required the right of trial by jury in civil cases where the amount in controversy exceeded $20.00.

The literature of the framing of the Constitution clearly shows the causes which gave rise to the enactment of the Seventh Amendment. We quote Jefferson: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution;" (3 Writings of Thomas Jefferson (Washington Ed. 71), and Washington: ". . . not a member of the Convention . . . had the least objection to what is contended for by the Advocates of the *Bill of Rights and tryal by Jury.*" (Records of Federal Convention, Farrand, Vol. 3, pp. 297, 298) Marshall said: "I hope that in this country, where impartiality is so much admired, the laws will direct facts to be ascertained by a jury." (3 Elliott's Debates 558) Hamilton said: "It has been observed that trial by jury is a safeguard against an oppressive exercise of the power of taxation." Federalist Number LXXXIII (p. 615). Luther Martin said ". . . should any Individual dare to dispute the conduct of an Excise Man, ransacking his Cellars he may be hoisted into the Federal Court from Georgia, to vindicate his just rights or to be punished for his impertinence." 3 Farrand, The Records of the Federal Convention (p. 156). Patrick Henry declared: "I ask you, What is the value of that privilege (the right of trial by jury in civil cases) when Congress, in all the plentitude of their arrogance, magnificence, and power, can take it away from you, will you be satisfied? Are we to go so far, to concede everything to the virtue of

Congress? Throw yourselves at once on their mercy; be no longer free than their virtue will predominate; If this will statisfy Republican minds, there is an end of everything." (3 Elliott's Debates, 544.) (The parenthesis and the words within it have been added by us.)

Men obviously feared despotic power of Government. They feared the Government would enact a law by virtue of which property belonging to a citizen would be transferred by Congress to the Government. They were fearful that that which is being done here, would be done. They regarded a jury trial "as the only anchor ever imagined by man, by which a government can be held to the principles of the Constitution."

The appellees have heretofore taken lightly the contention as to the necessity of a trial by jury. They asserted in the trial court that it is "late in the day to object that the Congressional choice of an expert body to try the facts necessary to carry out regulating measures violates the Seventh Amendment." It is interesting to note that the appellees were assuming that the claim against the appellant is a regulatory measure. They seek to brush off the want of constitutional power of the Executive Branch of Government to assert, determine and collect a claim for money against an individual on the ground that it is a regulatory measure.

It is one thing for the Federal Government to create regulatory measures committing to the Executive Branch of Government the authority to order the affairs of employees and employers; of great transportation and other utility systems in interestate commerce; and of other national social instrumentalities within the powers granted to it. It is quite another thing to say that the Executive alone can regulate in respect of how much a citizen shall pay the Federal Government in exactions other than taxes.

The stark reality is that the appellees, as an administrative agency, assert that appellant owes the Government $270,000 for 1943 and $204,000 for 1942 solely because they determined such to be the fact, and they propose to collect the additional $270,000 as they collected the $204,000, whether they be right or wrong. This is the very thing against which Mr. Justice Paterson raised his voice in *Vanhorne's Lessee* v. *Dorrance*, 2 Dall. 303. In that case, sitting as a trial judge, he said: (p. 308)

> "The right of trial by jury is a fundamental law, made sacred by the Constitution, and cannot be legislated away."

The question in that case was whether an act of a legislature, by which the defendant claimed real estate, was constitutional. In that case, Mr. Justice Paterson (who had been a member of the convention that framed the Federal Constitution) said (p. 309):

> "The English history does not furnish an instance of the kind; the parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation and shock all mankind. The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation."

It is plain enough that if the Government can do what appellees propose to do in this case by precluding the aggrieved person from having his case tried by a jury, no man is free from despotic action.

The tendency of the Executive Branch of Government to attempt to sustain these arbitrary actions is manifest in the case of *Galloway* v. *United States*, 319 U.S. 372, where

the Attorney General's contentions were upheld by a divided court, and in the case of *Estep* v. *United States*, 327 U.S. 114, where one accused of a crime was denied in the trial court the right to prove before a jury a defense which an administrative agency had determined adversely to him.

If the only legal mode of enforcing payment of a debt due the United States is by resort to a court, *Kilbourn* v. *Thompson*, 103 U.S. 168, and if the determination of the existence of such debt is a matter for determination by a court, it follows that such a claim is the subject matter of a suit at common law, in which suit appellant is entitled to a trial by jury. If any other result be reached, the right to a jury trial deemed so essential has been nullified, and it has been done in the exact situation which the framers of the Constitution feared, and believed they had obviated. It has been done in regard to a claim against a citizen asserted by the Executive Branch, determined by the Executive Branch, and collected by the Executive Branch.

The independent judiciary, the exclusive vesting of judicial power in the courts, and the individual's right to a trial by jury established by the Constitution and the Seventh Amendment, have been legislated away.

IV.

THE ACTS VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty or property without due process of law.

Appellant has been deprived of $204,000 and will be deprived of an additional $270,000 unless the proposed action of the War Contracts Price Adjustment Board be restrained.

The first question in respect of the due process clause is whether the Congress may within the provisions of the Fifth Amendment deprive this Court of its traditionally recognized power to determine whether a law be constitutional.

In *Pennekamp* v. *State of Florida*, 66 S. Ct. 1029, 1031, this Court said:

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect."

Section 403 (c) (1) of the Renegotiation Act provides, in part, as follows:

> "In the absence of the filing of a petition with The Tax Court of the United States under the provisions

of and within the time limit prescribed in subsection (c) (1), such order (the order of the Board) *shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency.*" (Italics and parentheses ours.)

Section 403 (e) (1) of the Renegotiation Act provides that:

"Upon such filing (a petition for redetermination) such Court (The Tax Court) shall have *exclusive* jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor, or subcontractor, *and such determination shall not be reviewed or redetermined by any court or agency.*" (Italics and part in parenthesis ours.)

If the Constitution of the United States imposes upon this Court final authority to determine whether appellant has been accorded due process of law, and the Renegotiation Act vests in The Tax Court exclusive jurisdiction over renegotiation matters and denies to this Court or any other Court the right to review the action of The Tax Court, then the Renegotiation Act is in direct conflict with the due process clause of the Fifth Amendment. If the Legislative Branch, by the enactment of the Renegotiation Act, can deny to this Court its "final authority" as vested in this Court by the Constitution, this constitutional limitation on the Legislative Branch has ceased to exist. If the Legislative Branch can transfer to The Tax Court the functions traditionally belonging to and reposed in the courts, then the due process as guaranteed by the Constitution becomes only that which the Legislative Branch shall determine to be due process, not what this Court shall determine it to be.

In our opinion, the invalidity of the Renegotiation Act is apparent on this ground alone without further examination of its provisions.

In addition, the renegotiation acts are invalid in other respects. Before discussing the acts for the purpose of showing their further invalidity, some disposition should be made of those matters which have served only to obscure the real issue and to prevent a determination that the renegotiation acts deny due process of law. Those matters briefly stated are as follows:

(A) While there are wide differences of opinion as to the necessity or effect of the renegotiation acts, those questions are primarily for Congressional determination, and beneficial or otherwise are not subject to inquiry here if within Constitutional limitations.

(B) Recognition is given to the war powers of Congress which permit the government to control the price of every commodity bought and sold within the national boundaries (*Yakus* v. *United States*, 321 U.S. 414); to fix the amount of rent to be charged for every room, home, or building (*Bowles* v. *Willingham*, 321 U.S. 503); to construct extensive systems of public works (*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288); to operate railroads (*Northern Pacific R. Co.* v. *North Dakota*, 250 U.S. 135); to prohibit the sale of liquor (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146); to restrict freedom of speech in a manner that would be unwarranted in time of peace (*Schenck* v. *United States*, 249 U.S. 47); to ration and allocate the distribution of every commodity important to the war effort (*Steuart & Bro.* v. *Bowles*, 322 U.S. 398); to restrict the personal freedom of American citizens by curfew orders and the designation of areas of exclusion (*Hirabayashi* v. *United States*, 320 U.S. 81); and to demand of every citizen that he serve in the armed forces of the nation (*Falbo* v. *United States*, 320 U.S. 549, *Selective Draft Law Cases*, 245 U.S. 366).

But broad as those powers may be, and necessary as

they are conceded to be, the "war powers" do not supersede the other provisions of the Constitution. The exercise of those powers does not extend beyond the limitations imposed by the Constitution itself. *Ex Parte Milligan*, 4 Wall. 2, 121-127; *United States* v. *Cohen Grocery Co.*, 255 U.S. 81; *Estep* v. *United States*, 327 U.S. 114. In *Schechter Corp.* v. *United States*, 295 U.S. 495, discussing this limitation, the court said (p. 528):

> "The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the Constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment, 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people'."

(C) Recognition is accorded to the propriety of the delegation of certain powers, in certain situations, to administrative agencies, but the recognition of the propriety of such delegation does not extend to a situation where the administrative agency can assert and determine a money claim by the Government against a citizen and collect it without according to the the citizen a hearing in a constitutional court of the United States *prior* to the collection. *Stark* v. *Wickard*, 321 U.S. 288; *Kilbourn* v. *Thompson*, 103 U.S. 168.

Perhaps, the starting point for the consideration of the two acts as denying due process of law, is the recent decision of the court in *Betts* v. *Brady*, 316 U.S. 455. In that case, this Court said: (p. 462)

> "Due process of law is secured against invasion

by the federal Government by the Fifth Amendment, and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances and in the light of other considerations, fall short of such denial."

If then the acts, or either of them, tested by an appraisal of the totality of the facts, show such a denial of fundamental fairness as is shocking to a universal sense of justice, we may assume that such acts, or the act so offending, will be declared unconstitutional, as contravening the Fifth Amendment.

When the first act is discussed, we discuss it in accordance with the interpretation placed upon it by the Secretaries, that is, that it authorized them to make and enter orders determining excessive profits, without having reached an agreement with the contractor or subcontractor.

(A) The First Act (The Sixth Supplemental National Defense Appropriation Act, 1942 as Amended prior to February 25, 1944.)

The first renegotiation act was enacted April 28, 1942. It purports to apply to all contracts of a contractor aggregating over $100,000, unless final payment was made thereon prior to April 28, 1942.

On April 28, 1942, appellant was informed by the provisions of this act that notwithstanding the terms of its contract with its several customers, appellant would not receive the contract price for its merchandise if, in the opinion of the Secretary, the profits which it might realize

on those contracts were excessive in the opinion of the Secretary. This [illegible] something new and original. Appellant may have been willing to have its *prices* determined subsequently upon some basis comparable with the prices paid to other manufacturers of similar articles. Appellant may have been willing to have its *profits* on those articles subsequently determined by some known means, such as is provided by the Internal Revenue Code. But appellant did not then, nor at any other time, agree that such profits should be determined by a stranger to its contracts, even though that stranger be the Secretary of War. In a succeeding portion of this brief, in which the retroactive aspect of the acts are discussed, the effect of the statute on appellant's existing contracts is more fully discussed.

The first consideration in the totality of the facts is the effective date of the act, and the effect upon existing contracts made between persons who, at the time of the making of the contracts, were not advised that the profits on their contracts were subject to diminution by action of and administration officer. Sections 403 (b) (3) and 403 (c) (6) provide that the act shall be applicable unless the aggregate of all the contracts does not exceed $100,000. Section 403 (i) (1) exempts from renegotiation any contract or subcontract for the product of a mine, oil or gas well or other mineral or natural deposit or timber which had not been processed, refined or treated beyond the first step. Section 403 (i) (2) gave the Secretary a discretion to exempt other contracts. The purpose of the act is not stated in the act, and it is impossible to see why it should embrace one manufacturer, depending upon the extent of his contracts or the nature of those contracts, and exempt another contractor because of the nature of those contracts, or the volume thereof, or because of the Secretary's opinion that such contracts should be exempt.

Assuming one knows what are excessive profits, contracts of $99,000 can yield excessive profits as easily as contracts of $101,000. Contracts for the products of a mine, oil or gas well, or timber, are as susceptible of profits as are contracts for the manufacture of Diesel fuel injection pumps, or aircraft engine parts.

In *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, this Court held that an exaction imposed upon the right to record a mortgage which did not mature in five years with an exemption of mortgages executed to building and loan associations was violative of the due process clause in that it arbitrarily imposed the exactions on a mortgage that did not mature in five years while mortgages which did mature in five years were free from the exaction. Of this, the Court said (pp. 38, 39):

> "Here it seems queer that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privilege which, aside from the amount of the recording fee which is paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be if invoked as the sole basis for a like classification in respect of such property."

The second consideration then in the totality of the facts is the lack of uniformity based upon any reasonable classification of the industries engaged in a total war, or the nature of the contracts.

Section 403 (c) (1) provides that whenever in the *opinion* of a Secretary of a Department the profits realized, or likely to be realized, may be excessive, the Secre-

tary is authorized to require the contractor or subcontractor to renegotiate the contract *price*. The following sentence of the same section purports to authorize renegotiation to eliminate excessive *profits* on all contracts, and purports to eliminate the necessity of renegotiating *price* on each contract or prices on all of them.

Here is a shock to the universal sense of justice. The opinion of the Secretary that excessive profits are likely to be realized is all that is required to require the contractor to renegotiate *price*. If there be two or more contracts, his opinion alone is all that is required to renegotiate *profits*. This type of a statute, becoming effective upon an opinion of an executive official was held invalid in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. Under the provisions of this act, four contractors could have made the same profits upon the sale of the same articles, at the same prices. The Secretary of the Navy could have dealt with contractor A and he could have been of the opinion that no excessive profits had been realized. The Chairman of the Maritime Commission could have dealt with contractor B and he could have reached the same opinion. The Secretary of War could have dealt with contractors C and D. As to C, it could have been his opinion that no excessive profits had been realized, but, as to Contractor D, he could have a different opinion, and so D could be renegotiated and his profits could be diminished to the extent determined by the Secretary. Why D alone could be selected in such a situation is not known. The Secretary's opinion that he should be renegotiated is all that was required.

Section 403 (a) (4) defines excessive profits as follows:

> "(4) the term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

If there were any prior doubt as to the denial of fundamental fairness, this section should immediately dispel that doubt. Excessive profits shall be that which is found by the Secretary to be excessive profits. Short and simple, but not due process.

Without repetition, we again adopt all that was said under Point I of this brief to the effect that the definition of excessive profits failed to provide any adequate standards for the guidance of the administrative agency. But considered only under this part of the brief, the right to select certain contractors to be renegotiated from the body of all contractors, with the definition of excessive profits does not appeal to the universal sense of justice.

Section 403 (c) (4), which is the only section of this act which purports to define how the determination of excessive profits shall be made, provides as follows:

> "(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact."

Whether the section contemplated a determination only after an agreement between the Secretary and the contractor, the fact is that the Secretary made his own determination. The contractor has nothing to do with the determination. Appellant speaks from experience. After failing to acquiesce in the Secretary's opinion as to the

realization of excessive profits of $775,000, appellant received the order of October 27, 1943, wherein the Secretary determined that excessive profits of $775,000 had been realized. The order recites "that as a basis for said renegotiation the Under Secretary of War considered certain financial, operating and other data submitted by the Contractor, *or obtained by the Under Secretary of War from Governmental or other reliable sources* relating to the profits realized by the contractor during said fiscal year." (Italics ours.) (R. 170)

What data was received from governmental sources is known only to the Secretary. What the other reliable sources were, is known only to the Secretary. What data was received from those other reliable sources is known only to the Secretary. This information the Secretary refused to furnish to the contractor. Attached to and made a part of the complaint (Exhibit C) is a letter of Lt. Col. Martens, Chief Renegotiation Branch, on the stationery of the War Department to appellant's attorney, wherein the appellant's request for information as to the facts used as a basis for the determination was refused. (R. 172)

No comment is necessary as to whether the order and the letter denying information as to the basis of the determination constitute such a denial of fundamental fairness as is shocking to the universal sense of justice. That such procedure cannot be upheld is evident from the decisions of this court. In *Ohio Bell Tel. Co.* v. *Comm'n.*, 301 U.S. 292, this Court considered a similar order of an administrative agency. This Court, in discussing the order and the action of the agency, said (p. 296):

> "It undertook also to fix a valuation for each of the years 1926 to 1933 inclusive. For this purpose it took judicial notice of price trends during those years, modifiying the value which it had found as of

the date certain by the percentage of decline or rise applicable to the years thereafter. The first warning that it would do this came in 1934 with the filing of its report. 'The trend of land valuation was ascertained,' according to the findings, 'from examination of the tax value in communities where the company had its largest real estate holdings.' 'For building trends resort was had to price indices of the Engineering News Record, a recognized magazine in the field of engineering construction.' 'Labor trends were developed from the same sources.' "

In condemning such an order and setting aside the proceedings, this Court said (pp. 302, 303):

"From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

To the same effect are *Morgan* v. *United States*, 304 U. S. 1 and *Morgan* v. *United States*, 298 U. S. 468.

Appellant was renegotiated upon an opinion of the Under Secretary of War. Under the statutory definition of excessive profits, excessive profits were found to have

been realized by the same person who expressed the opinion that excessive profits had been realized. Upon data unknown to appellant, but in part alleged to have been received from governmental or other reliable sources, also unknown, $775,000 was determined to be excessive profits. In the workings of this statute, only one further act in the denial of fundamental justice could occur. It did occur in July, 1944.

This act, enacted April 28, 1942, contained *no* provision whatsoever for any review, judicial or otherwise, of the determination made by the Secretary. On October 27, 1943, when appellant received the order of the Secretary there was a reasonable certainty that the renegotiation act would be repealed, amended, or revised in order that contractors might not be subjected to the arbitrary action of the Secretary. On February 25, 1944, the Renegotiation Act, as a part of the Revenue Act of 1943, was enacted. Under this act, Section (e) (2), a contractor aggrieved by a determination made prior to February 25, 1944, could file within 90 days after February 25, 1944, a petition for redetermination in The Tax Court. Appellant filed such a petition on May 18, 1944, alleging the invalidity of the act, and its improper application, even if the act be determined to be valid. (R. 136)

Section 403 (c) (2) of both acts, authorizes the Secretary, upon renegotiation, to eliminate excessive profits by (1) reduction in contract price, (2) by withholding from amounts otherwise due the contractor, (3) by directing a contractor to withhold for the account of the United States from amounts otherwise due to the subcontractor any amount of such excessive profits under the subcontract, (4) by recovery through repayment, credit or suit any amount of excessive profits actually paid, and (5) by any combination of these methods. The Secretary

was authorized to bring suits on behalf of the United States in the appropriate courts of the United States to recover any amount of excessive profits paid and not otherwise eliminated.

In April, 1944, the Secretary directed customers of appellant to withhold $204,000 for the account of the United States from the funds then due appellant on current business. In July 1944, *after* appellant had filed its petition for redetermination in The Tax Court, the Under Secretary directed some of those customers to pay $204,000 into the Treasury of the United States, and said sum due to appellant was so paid into the Treasury of the United States by such customers, who are indemnified by the United States upon the making of such payments. (Section (c) (2))

Appellant's petition for redetermination of alleged excessive profits is still pending in The Tax Court, but the $204,000 has been paid into the Treasury since July, 1944.

Such is an analysis of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, and a summary of its application to appellant, as the Act was construed and applied by the Secretary.

All this happened to appellant notwithstanding that the first act is devoid of any authority to make a unilateral determination. Thus appellant was deprived of $204,000 under an administrative construction of the act which construction has no basis except the desires of the Secretaries to exert power.

The first act, does not authorize the Secretaries to make unilaterial determination of "excessive profits." They could make no determination of excessive profits without the agreement of the contractor. "Renegotiation" as used in the act had its ordinary connotation: a new negotiation with a view of making readjustments. Hensel's

affidavit (R. 91-94) Patterson's affidavit (R. 22 et seq.) It is said that many contractors wished to make voluntary agreements to return money in excess of that they thought should have been paid. The act provided an orderly method of doing this. Section 403 (c) (1) provided in part:

> "Sec. 403 (c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed *to require the contractor or subcontractor to renegotiate the contract price.* When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may *renegotiate* to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately *renegotiating* the contract price of each contract or subcontract." (Italics ours.)

Like the Labor Relations Act, 49 Stat. 449, 29 U.S.C. 158 (5), these is no compulsion except the duty to negotiate in a bona fide manner, as the employer under the National Labor Relations Act is required to bargain in a bona fide manner. *Labor Relation Board* v. *Sands Mfg. Co.*, 306 U.S. 332. But here, like there, there is no requirement that an agreement should be made. To be sure, the Secretary was authorized to collect, but this was only after an agreement had been reached. Section (c) (4) provides: "Upon renegotiation the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract . . ." Then follows several methods for the elimination of excessive profits, determined by agreement. Section (c) (4) makes it more plain that only voluntary agreement was contemplated. It provides as follows:

> "(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge

of any liability for excessive profits under this Section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of material fact."

We are not alone in our interpretation of the act. Appellee Patterson said "'Renegotiation', in and of itself implies an agreement, mutual agreement . . . you can argue that it means 'move in.' I myself, believe that renegotiation is mutual." (Hearings before a Subcommittee of the Committee on Finance, United States Senate, 77th Congress, 2nd Session, on Section 403 of Public Law Numbered 528 p. 13) The act was amended three times after Mr. Patterson testified as quoted above before any change was made in respect of this language of the statute.

Appellant has printed in some detail the legislative history of these acts in an appendix which it has filed with this brief. There has been much discussion as to whether or not this legislative history proves anything, in respect of whether the Congress intended that there should be "compulsory renegotiation." If the contradiction in terms were not sufficient to disprove the contentions of those who say that the Congress intended there should be "compulsory renegotiation," the legislative history does disprove such fact.

More than that, construed as appellant construes it, all the provisions of the act are logical. Construed as appellees would construe it, all are most illogical. The definition of excessive profits contained in the first act—"any amount of the contract or subcontract which is found as a result of renegotiation to represent excessive profits"

is logical, as we construe the act. As appellees construe the act, it is illogical. The provisions contained in Section (c) (4) of the act that: "such agreement shall not be reopened as to matters agreed upon and shall not be modified by any officer, employee or agent of the United States, and such agreement and any determination made in accordance *therewith* shall not be annulled, modified, set aside, or disregarded in any suit, action or proceedings," are logical as we construe the act. Viewed in any other light, they are not only illogical, but they render the act unconstitutional for the reasons we have heretofore shown.

If anything need be added, it need only be pointed out that the War Department Price Adjustment Board on August 10, 1942, published a pamphlet entitled "Principle, Policy and Procedure" to be followed in renegotiation. One may read this document from cover to cover and not find one word in respect of compulsory renegotiation, unilateral determinations or any procedure by which the War Department suggested that it had any right to compel the contractor to make any repayment in any amount except upon the contractor's agreement to do so. The Secretaries truly made their own law without lawful delegation of power to do so, when they determined that the first act authorized them to make a "unilateral" order determining excessive profits. It was never intended by the Congress in enacting the first act, that they should do so.

Such is the totality of the facts to be appraised by this court, in determining whether the due process clause of the Fifth Amendment has been contravened. We contend that it has been. The facts speak more eloquently than any comment we could make.

The Second Act (The Renegotiation Act).

On February 25, 1944, the Renegotiation Act was enacted as a part of the Revenue Act of 1943. It purports to apply to all contracts or subcontracts aggregating $500,000 to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to or after the date of the enactment of the Revenue Act of 1943. (Section 403 (c) (6))

In a succeeding portion of this brief designated "Retroactivity" the effect of this statute on appellant's existing contracts as applied to sales made in 1943, is fully set forth and is not repeated here. Attention is, however, directed to the fact that again a statute was enacted, which by its terms purports to subject contracts made prior to the enactment of the statute to change, alteration and modification by a stranger to those contracts, this time by the War Contracts Price Adjustment Board, an administrative agency newly created by this act. (Section (d) (1))

Section (i) (1) provides that the Act shall not apply to (a) contracts between the departments, between the departments and a State, territory or agency thereof, or, with any foreign government, (b) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber which has not been processed, refined or treated beyond the first form suitable for industrial use, (c) any contract for an agriculture commodity in its raw or natural state, which agriculture commodities shall include, but were not limited to commodities resulting from cultivation of the soil, grains, fruits, nuts, vegetables, hay, straw, cotton, tobacco, sugar cane, sugar beets, natural resins, saps,

gums of trees, animals such as cattle, hogs, poultry, sheep, fish and the produce of live animals such as wool, eggs, milk or cream (d) any contract exempt under Section 101 (6) Internal Revenue Code, (contracts of religious and charitable organizations) (e) any contract with a department awarded as a result of competitive bidding for the construction of a building, structure, improvement or facility.

In addition to the foregoing statutory exempt contracts, Section 403 (i) (4) gave to the Board the power in its discretion to exempt other contracts, namely (a) contracts to be performed outside of the United States, or in Alaska, (b) those contracts which in the opinion of the Board the profits can be determined with reasonable certainty when the contract price is established, (c) any contract or subcontract if in the opinion of the Board the provisions of the contract were otherwise adequate to prevent excessive profits, (d) any contract or subcontract for the making or furnishing of a standard commercial article, if in the opinion of the Board competitive conditions affecting the sale of such article are such as will reasonably protect the Government against excessive prices, (e) any contract or subcontract, if in the opinion of the Board competitive conditions affecting the making of such contract are likely to result in effective competition, (f) any subcontract or group of subcontracts not otherwise exempt, if in the opinion of the Board, it was not administratively feasible to determine and segregate the profits of those contracts from the profits attributable to activities not subject to renegotiation. The exemption of standard commercial articles was intended to aid industry, but the definition of a "Standard Commercial Article" contained in Section (a) (7) coupled with the right given by Section (i) (2) to the War Contracts Price

Adjustment Board to interpret and apply the definition of "standard commercial articles" as contained in subsection (a) (7), soon demonstrated that this exemption was merely the rendition of lip service to industry. Needless to say, appellant's contention that a substantial part of its sales were of standard commercial articles, was denied by the Board. Needless to say, appellant's request for a certificate of exemption on standard commercial articles was denied. (R. 148)

If the first Act (1942) demonstrated a lack of uniformity in its operations, without any reasonable basis therefor, what must be said of the Renegotiation Act? Exemption after exemption appears without any reasonable basis. Assuming one knows what excessive profits may be, what rational relationship exists between excessive profits on sales of $500,000 and over, that is not equally applicable to excessive profits on sales of $499,000? Surely excessive profits can be realized on contracts of $499,000 as easily as on contracts of $500,001. Certainly the size of a contract is not proof of profits. If a fair limitation in 1942 was $100,000, why in February 1944 was $500,000 the starting point for those searching for excessive profits?

Examine the list of discretionary exempt contracts, (a) to (e) above, and it will be apparent that the Board could exempt *every* contract of *any* kind if it so desired. This is the degree of arbitrary classification which the Court condemned in *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32.

Section 403 (c) (1) provides, that whenever in the opinion of the Board, the amounts received or accrued under contracts with the Departments may reflect excessive profits, the Board shall give reasonable notice of the time and place of a conference with respect thereto. The same section provides that if the Board does not make an

agreement with respect to the elimination of excessive profits received or accrued, it shall enter an order determining the amount and give notice thereof, by registered mail to the contractor or subcontractor. Here there is no necessity for the assumption by administrative officers of arbitrary power. Such power is expressly provided by this statute.

Under this section, if one has contracts not exempt by the statute, or not exempt by reason of the discretion vested in the Board, renegotiation proceedings may be commenced, if in the opinion of the Board, the amounts received or accrued may reflect excessive profits. There need be no logical basis for such opinion. There is nothing in the act which controls that opinion. But if the Board be of that opinion, the contractor is advised that a conference will be held with respect to the alleged excessive profits. No finding of facts need be made. It is not a hearing in any known sense of the word. No complaint or charges are presented which one might answer. It is a conference. If the contractor fails to acquiesce in the opinion of the Board, expressed in this or subsequent conferences, then under this section, (c) (1), the Board may enter an order determining the amount of the alleged excessive profits. It did.

But the entry of the order is not all that occurs. Section (c) (1) further provides that in the absence of the filing of a petition in The Tax Court within the time provided by section (e) (1) the order of the Board, "shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency." Section (e) (1) giving the right to file a petition in The Tax Court also provides:

> "The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2)."

Stripped of unnecessary words, the contractor selected by the Board for renegotiation is invited to a conference with respect to his alleged excessive profits. He may acquiesce in the Board's determination of excessive profits, but should he fail or refuse to do so the Board will enter an order determining the amount of his alleged excessive profits regardless of the contractor's objections. If the contractor fails to file a petition in The Tax Court, the determination of the Board is final and conclusive, and not subject to review or redetermination by any court or agency. If the contractor files a petition in The Tax Court in the manner provided by the statute, it does not operate to stay the order of the Board. This is the procedure followed which deprived appellant of $204,000 in July, 1944, while its petition was and is still pending in The Tax Court. This is the procedure followed under which appellees admit they would deprive appellant of an additional $270,000 determined by the Board to be due for the year 1943, regardless of the fact that appellant had filed in The Tax Court its petition for redetermination for the year 1943, and regardless of the fact that there has been no hearing thereon.

In an appraisal of the totality of the facts, does this procedure meet with any conception of a universal sense of justice?

Section 403 (a) (4) of the first act, defined excessive profits as those found as a result of renegotiation to represent excessive profits. This definition was apparently admitted to be so vague and uncertain as to invalidate the act, so when the Renegotiation Act was enacted, an attempt was made to correct this error and to direct the Board's attention to seven factors which shall be considered in determining excessive profits. The result is the inclusion in the definition of many meaningless words, all of which still permit the Board to do as it desires.

It will be noted that excessive profits are to be determined not alone upon the alleged factors named, including the elastic factor numbered (vii). It is required only that such factors shall be considered. What else may be, or is, considered remains unknown. We again adopt all that was said under Point I of the brief to the effect that this alleged definition of excessive profits failed to provide any adequate standards for the guidance of the administrative agency.

Considered here, solely as a part of the totality of the facts, does the definition of excessive profits exhibit that fundamental fairness essential to due process of law?

After a conference in which appellant was advised of the Board's opinion as to the realization of excessive profits, in which opinion appellant refused to concur, appellant received the Order under Delegated Authority Determining Excessive Profits dated January 11, 1945, which, upon the refusal of the Board to review the decision of the delegate became the order of the Board. (Exhibit A to complaint. (R. 140) Again in the order it is recited that "there was submitted by the contractor and obtained from governmental or other reliable sources, certain financial operating and other data relating to the contractor's business and the contractor's profits," and upon consideration thereof it was determined that appellant realized excessive profits of $1,265,000 in its fiscal year ended November 30, 1943. (The appellant reported profits of $1,393,470.36 *before* taxes of $991,340.37, net after taxes $402,129.99. If the renegotiation demands for 1943 be allowed to stand appellant realized a profit of $128,470.36 *before* taxes, reduced by taxes of $74,740.37 to $53,729.99 *after* taxes, or to 1.514% of its sales. (Exhibit F to complaint, R. 186 side folio).

Does the entry of this order, upon data received from

governmental or other reliable sources, which were unknown to appellant appeal to the universal sense of justice? It did not do so in *Ohio Bell Tel. Co.* v. *Comm'n.*, 301 U. S. 292.

Following the receipt of said order, appellant in compliance with section (e) (2), filed its petition for redetermination for the fiscal year 1943 in The Tax Court, where said petition is still pending. (R. 142)

Attention is again directed to the fact that under section (e) (1) the filing of said petition does not stay the execution of Board under section (c) (2). Appellant alleged that collection would be made, as in the prior year, by direction to its customers to make payment and, therefore, filed this suit. The affidavit filed by appellee Hirsch admits that appellant's allegation was well founded, and that appellees proposed to effect collection of the amount determined by the Board in the same manner as was done in the prior year regardless of the pendency of appellant's petition in The Tax Court. (R. 117)

The threatened deprivation of property following a conference, while appellant was attempting to secure a hearing in the agency designated by the act, does not appeal to a universal sense of justice. One expects a hearing *before* it is deprived of its money.

We adopt here all that has been said before under Point II as further supporting our contention that a hearing before The Tax Court does not constitute due process in a suit, where the very nature of the claim establishes that it is traditionally a matter for constitutional courts.

One other matter common to both acts must receive attention in a consideration of a totality of the facts. Neither the 1942 act or the 1944 provides a means or a procedure for the recovery by the contractor of the amounts illegally taken from him, if it should appear that

the acts are invalid, or that the Board was in error in its opinion that excessive profits had been realized, or if it should appear that the Board was in error as to the amount of such excessive profits. In a consideration of the totality of the facts with regard to so drastic a statute, one would expect to find a simple and speedy procedure for the correction of such errors, and for the refunding of the amounts illegally collected with interest. No such provision is contained in either act.

Does the absence of any corrective procedure, or a procedure for refunds of amounts equal to those collected, indicate a lack of fundamental fairness or is it to be assumed that the determination of the War Contracts Price Adjustment Board made upon the definition of excessive profits will always be sustained, or will be increased, by The Tax Court?

The retroactive effect of the acts as a denial of due process.

Reference has been made before to the retroactive features of both acts, as being a denial of due process.

It is not contended that all laws with retroactive effect are invalid. Retroactive effect of revenue and tariff laws, within reasonable degrees has been approved. *Welch* v. *Henry*, 305 U. S. 134 and *United States* v. *Heinszen & Co.*, 206 U.S. 370. In *Illinois Central R. Co.* v. *Minnesota*, 309 U.S. 157, it is said (p. 165):

> ". . . liability for retroactive taxes is 'one of the notorious incidents of social life.'"

The doctrine of retroactivity has not been extended, however, and even retroactive revenue laws are not favored. When arbitrary or capricious, retroactive revenue laws have been held to offend the Fifth Amendment. *Nichols* v. *Coolidge*, 274 U. S. 531; *Untermyer* v. *Anderson*, 276 U. S. 440.

The permissible area in which the doctrine of retroactivity may be sanctioned is stated in *Forbes Boat Line* v. *Board of Comm'rs.*, 258 U. S. 338. In that case the legislature of Florida attempted to pass a statute retroactively in respect of the power or right to charge tolls to pass through a lock.

In the case, Mr. Justice Holmes, speaking for a unanimous court, said (p. 340):

> "But Courts cannot go very far against the literal meaning and plain intent of a constitutional text. Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. *Yet no one would say that a claim for goods sold could be abolished without compensation.* It would seem from the first decision of the court below that the transaction was not one for which payment naturally could have been expected. To say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot." (Italics ours.)

The first act was enacted April 28, 1942. It purports to apply to all contracts made prior to said date unless final payment was made on said contract prior to April 28, 1942 (Section 403 (c) (6)). During the fiscal year, ended November 30, 1942, appellant's total sales were $2,706,477.33, of which the Secretary determined $2,446,328.55 to be subject to renegotiation. (Compl. par. 3, R. 135)

In the complaint, (paragraph 35, R. 157) appellant alleged that 80% of the dollar value of its shipments made

in 1942 went to four customers, that such shipments were upon contracts made between the appellant and the customer prior to April 28, 1942, and that the aggregate of such shipments was $1,886,770.11 all of which was included by the Secretary in the amount alleged to be subject to renegotiation. Appellant alleged, (paragraph 37, R. 158) that the first act could not subject those sales to renegotiation which were made upon contracts made prior to April 28, 1942.

Some question existed as to whether the writings (all set out in the Kelleher affidavits and by reference made a part of the complaint) (R. 152) were contracts, or whether those writings were only statements showing an intention to purchase, becoming contracts only to the extent of purchase orders received subsequently to date of such writings. In view of this question, appellant then alleged, (paragraph 38, R. 158) that if the purchase orders *only* were contracts, then its shipments on purchase orders received prior to April 28, 1942, were $1,625,023.65, and that the act could not subject money derived from those purchase orders to renegotiation.

Whether the writings are contracts, or whether only the purchase orders are the contracts, is admittedly a matter for the determination of the trial court upon a hearing, and the several contracts do not now require the attention of this Court. Whether the act can embrace contracts made prior to April 28, 1942 is a matter, in our opinion, for the decision of this Court.

The facts are recited here solely as a means of showing the retroactive effect of the first law. The extent of retroactivity herein considered with the subject matter to which it is applied, goes beyond the extent permitted under the decision in the *Forbes* case.

The second act, the Renegotiation Act, raises even more

substantial questions as to its validity, because of its retroactive effect.

This act was enacted February 25, 1944. It purports to be applicable to all contracts and subcontracts to the extent of any amount received or accrued thereunder in a fiscal year ending after June 30, 1943, whether such contracts were made on, prior to or after the date of the enactment of the Revenue Act of 1943. (Section 403 (c) (2).)

The first question, as is shown by the allegations of the complaint is whether the Renegotiation Act so enacted February 25, 1944, can, even if it be otherwise valid, have retroactive effect as to the sales of appellant during the period December 1, 1942 to November 30, 1943. (Compl. par. 17, R. 144, 145, 146)

The further questions are to some extent similar to those applicable to the first act, but with the much greater extension of the degree of retroactivity.

During the fiscal year ended November 30, 1943, appellants total sales were $3,548,845.50, its costs $2,155,375.14, its profits before taxes $1,393,470.36, its taxes $991,540.37, and its profit after taxes $402,129.99. (Compl. par. 5, R. 137, 138) In the complaint (paragraph 22, R. 156) appellant alleged that 80% of the dollar value of its shipments made in fiscal year 1943 were made to the same four customers; that such shipments were upon contracts made between appellant and the customers prior to April 28, 1942; that the aggregate of such shipments was $2,780,009.82, all of which was included by the War Contracts Price Adjustment Board in the amount alleged to be subject to renegotiation. Appellant then alleged, paragraph 23 of the complaint (R. 152, 153) that neither the Renegotiation Act (February 25, 1944) or the first act (April 28,

1942) could subject those contracts made prior to April 28, 1942 to renegotiation.

The same question existing as to whether the writings were actual contracts or merely statements of an intent to purchase becoming contracts only to the extent of purchase orders subsequently received, appellant alleged that if only subsequent purchase orders were the contracts, then shipments on purchase orders received prior to April 28, 1942 were $175,423.71. It was then alleged, paragraph 27 of the complaint (R. 154) that the Renegotiation Act could not subject such purchase orders, received prior to April 28, 1942 to renegotiation.

The allegations pertaining to the contracts and shipments in the years 1942 and 1943 are contained in paragraphs 22 to 29, and 35 to 39 of the complaint. (R. 152-155 and R. 157-159)

Analysis of the renegotiation acts shows that, as to contracts in existence, prior to the enactment dates of each of the acts, the apparent aim and purpose of the acts was that the Government should pay less on such contracts than the contracts stipulated, if the Secretary (under the first act) or the War Contracts Price Adjustment Board (under the second act) made a determination that less should be paid because of the realization of alleged excessive profits. In the end the Government pays less on a valid and binding contract than it agreed to pay and by its action requires appellant to accept less for its products than it had contracted to receive from its customer. The acts do that which Justice Holmes condemned, namely, abolish a claim for goods sold.

These acts called renegotiation, are in fact, legislative repudiation by the United States of America of its contracts. The acts go beyond direct repudiation. They require contractor A to repudiate his contract with con-

tractor B, not because B failed to perform as he had agreed to do, but because in the opinion of an administrative agency of the United States, B realized excessive profits. In the *Sinking Fund Cases*, 99 U. S. 700 this Court said: (p. 719)

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state, or a municipality or a citizen."

This language has been repeated in *Lynch* v. *United States*, 292 U.S. 571, 580 and *Perry* v. *United States*, 294 U.S. 330, 351. Substantially the same statement was made in *United States* v. *Standard Rice Co.*, 323 U.S. 106 and *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 298.

This doctrine is not new, nor is it outmoded.

V.

BOTH ACTS VIOLATE THE TENTH AMENDMENT TO THE CONSTITUTION.

The Tenth Amendment to the Constitution is as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Unless the renegotiation acts come within some constitutional grant of power they cannot be sustained. This is true, though many may believe that the acts embody a commendable social plan, and are in sympathy with the alleged purpose, if a purpose is ascertainable. The test and the only test is whether the acts are within

the limits of federal power. *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495; *Child Labor Tax Case*, 259 U. S. 20. In their briefs filed in the trial court, appellees asserted that the acts come within the grant of the war powers to the Federal Government. It was asserted that the acts were regulating acts, regulating the procurement of materials, and that in addition the acts were means of keeping up the morale of the fighting men. These alleged purposes are not to be found in the acts themselves. That they are not regulating acts is certain from their operation. That they have nothing to do with the morale of the soldier is even more certain.

It is admitted that the war powers are among the most extensive of all Congressional powers. If the end to be achieved be determined to be within the war powers, Congress may determine the form in which the powers shall be constitutionally exercised. But, there must be some relation between the acts and the powers pursuant to which they purport to have been enacted. If the acts are not actually the exercise of "war powers," the use of that phrase will not aid in their support.

In an examination of the acts to determine whether they come within the war powers, it is conceded that the Government has the power to purchase materials for war, and to make such purchases as cheaply as possible. But the right to purchase as cheaply as possible does not relieve the government from the necessity of paying the price provided in its contract. *U. S.* v. *Bethlehem Steel Corp.*, 315 U.S. 289. Nor does the right to purchase as cheaply as possible carry with it the right to determine that one contractor's profits are excessive and should be diminished while those of another are allowed to remain unchanged.

There is no reason to believe that because an efficient manufacturer realizes more than that which is regarded

as normal profit, he is necessarily charging a higher price than another manufacturer who makes no profit. Under the type of statute considered here, the inefficient, expensive contractor might be free from renegotiation by reason of the fact that his inefficiency brought no profits while the capable contractor might make large profits doing precisely the same work, and by so doing be subject to renegotiation under the terms of the act. It will be asserted that contractor A could not perform as cheaply as contractor B, and that therefore A should receive higher prices. If such be the fact, then A should receive more for his product than B, but B's net profit should not be reduced because of the very efficiency of operation which the Government needed, encouraged and employed. The real question under the war powers, is the *cost* to the Government of the articles needed, not whether such cost yielded to one profits greater than to another. Revenue laws amply protect against the realization of excess profits.

That there was a great demand for materials of every kind and nature in 1942 and 1943 is admitted, but the renegotiation acts did nothing to assist in satisfying that demand. The acts as written may have prevented a large volume of manufacturing, rather than have given it an impetus at a time when the Congress ought to have been stimulating production. The business of exempting from renegotiation contractors and subcontractors who did not do a volume of business as great as $500,000 per year is not within the war power whatever may be one's notions of economics. Every incentive to increase, expand and speed production except the manufacturer's patriotism, is contravened by such a provision in the law. The contractor was told that if his aggregate was less than $500,000 he could not be renegotiated, and that he could keep every dollar of the profits realized. He was told that

if his sales exceeded $500,000 he would be subject to renegotiation and that the Board could take away from him whatever profits it deemed excessive. Patriotic endeavor alone, accounts for the record production of American industries. The renegotiation acts would have prevented that record production and failing in such effort would now exact penalties for the efforts which did increase production. Higher taxes were certain but they were uniform. Taxes did not depend upon an opinion of an individual nor upon the volume of business. The appellant, as this record plainly shows, would make more money on sales of $499,000, free from renegotiation, than it will make as renegotiated by the War Contracts Price Adjustment Board on sales of $3,548,845 in the year 1943.

The Renegotiation Act, did not even apply to a great number of contracts for materials used in the war regardless of the aggregate. The list of exempt contracts for war materials, regardless of the sum involved, is quite impressive. The list of discretionary exempt contracts for war materials regardless of the sum involved is even more so. If the war powers are the basis for the support of acts it would seem that the acts should apply to all contracts for war materials with some degree of uniformity, not dependent upon volume, or the opinion of an administrative agency.

Finally we come to the theory that the morale of the men of the fighting forces will be raised by the consciousness that manufacturers are not realizing excessive profits as a result of the war. The revenue laws are known to afford ample protection against the retention of excess profits. No one can draw a distinction between excessive profits from diesel equipment and excessive profits from erection of a building, or other exempt contracts for war materials, whether such exemption be mandatory or discretionary with the Board. We confidently assert that the

morale of the soldier is best raised and maintained by the knowledge that he has the best and finest equipment that money will buy, and by the knowledge that it will be readily available when needed. If this be so, the soldier does not care what it costs. To him, living is so imperative that cost of equipment means nothing. It is extremely doubtful whether he is really interested in whether the equipment was manufactured under an exempt contract, a discretionary exempt contract, by a manufacturer whose sales did not exceed $500,000 or by a manufacturer whose sales did exceed that figure. Those questions are of little importance and of no aid to his morale.

In our opinion the Renegotiation Act has no connection with the prosecution of war, and cannot be supported as an exercise of the war powers. Failing in such support it is not within the powers delegated to the Federal government.

VI.

IRREPARABLE INJURY WILL RESULT IF THE INJUNCTION BE DENIED.

Appellant's right to an injunction restraining collection is dependent upon the fact that irreparable injury will result from the denial of such injunction.

It is affirmatively asserted by respondents that additional collections will be made from appellant's customers in the same manner as was done under the prior determination for the year 1942. There is no uncertainty as to what will happen. The sum of $204,000 has already been collected pursuant to the first act, under circumstances similar to those now existing. The additional sum of $270,000 will be collected under the Renegotiation Act. This has only been prevented after the decision of the

trial court by appellant's filing bond in the sum of $100,000 pending the decision of this Court. The deprivation of $474,000 to a small company such as appellant, is a serious injury. The inquiry, then, must be directed to whether under all the circumstances, such injury is an irreparable injury.

The District Court based its decision on the ground that no irreparable injury existed because there were other remedies. These so-called remedies must, therefore, be considered to ascertain whether they are actually adequate.

(A) The Remedy in The Tax Court.

It is first suggested by the District Court that appellant has an adequate remedy by a petition for redetermination filed in The Tax Court of the United States, and that since The Tax Court may find that appellant realized no excessive profits, this suit is premature and should be dismissed. It is suggested that until the administrative remedy, the petition in The Tax Court, has been exhausted, appellant has no right to maintain this suit.

That appellant had the right to file a petition for redetermination in The Tax Court is admitted. (Renegotiation Act, Sec. 403 (e) (1)). Such a petition was filed. The right to file a petition in The Tax Court, the filing of such petition, and any redetermination made by it is not a remedy. The filing of a petition in The Tax Court does not, and cannot restrain collection, regardless of the unconstitutionality of the law or of an erroneous determination of the Board. The Renegotiation Act expressly provides that the filing of such a petition shall not operate to stay collection of the amount determined by the Board to be "excessive profits" (Sec. 403 (e) (1)). The Tax Court has no power to stay collection pending redeter-

mination. In fact, appellant's experience for the year 1942 would indicate that the filing of a petition in The Tax Court, far from being a remedy, expedites illegal collection. As applied to the year 1942, prior to the filing of the petition in The Tax Court, the Under Secretary of War merely directed the withholding of amounts due appellant by appellant's customers, but after the filing of the petition in The Tax Court by appellant, the Secretary directed payment of the amounts so withheld into the Treasury of the United States.

A remedy is that which prevents an impending injury, or at least redresses a wrong. It is never a mere formality of procedure which is ineffectual to ward off the injury or to redress the wrong. It has been suggested that while the petition in The Tax Court may not ward off the injury, that *after* The Tax Court has made its decision, its decision redresses the wrong. This is not the fact. Long before the decision of the Tax Court has been rendered collections from customers will have been made solely because the Board has made its determination. The Board might be, and in our opinion is, in error both as to the validity of the law and the correctness of the determination. These questions should be determined before further injury is inflicted upon appellant. The 1942 petition in The Tax Court has been pending since May 18, 1944, and appellant has been allowed to do nothing beyond the filing of this petition, but $204,000 of funds due and payable to appellant have been paid into the Treasury of the United States. The 1943 petition, filed in July 1945, probably will be as long delayed. The Tax Court cannot, in our opinion, determine authoritatively the constitutionality of the Renegotiation Act. That is solely the function of this Court. After the decision of The Tax Court has been rendered (even assuming the validity of the law) there is no procedure by which appellant can recover the amount col-

lected, if, as the District Court suggested, The Tax Court should determine that no excessive profits have been realized. In recognition of the absence of a procedure for recovery of amounts illegally collected, an appropriation statute was enacted (First Deficiency Appropriation Act of 1945, Public Law 40, 79th Congress 1st Session), appropriating $15,000,000 for the repayment of improper and excessive renegotiation collections. This appropriation expired in June 1946. Whether succeeding statutes will be enacted is not known. Whether appellant will be assured the same speed in repayment as appellant experienced in collections is not known. Whether interest be allowed is not known. The Renegotiation Act is silent in all of these respects.

The petition in The Tax Court is not a plain, adequate and speedy remedy. The provisions of section 403 (e) that the proceeding in The Tax Court shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo*, has already been construed as placing the burden on the contractor to show that the determination of the Board is erroneous. (Rule 32 of The Tax Court, *Stein Brothers Mfg. Co.* v. *Secretary of War*, 7 T. C. 864, decided September 26, 1946.) The grim reality known to everyone, is that after long delay, The Tax Court may make a determination that the Act is unconstitutional, or if constitutional that appellant has realized no excessive profits, or has realized excessive profits in an amount much less than that determined by the Board. Possibly at that far future date some device will be in existence for the prompt refunding with interest of the amounts illegally collected. No such device is provided by the Renegotiation Act. Today none exists. Today the loss of an additional $270,000, the work necessary to its recovery, the uncertainty as to a procedure for recovery, and the uncertainty

as to repayment must all be patiently assumed by appellant, because it is alleged to have a remedy, the right to file a petition in The Tax Court for redetermination.

But it will be contended, even if the right to file a petition in The Tax Court is not an adequate remedy, this suit is premature, because this administrative remedy, whether adequate or otherwise, has not been exhausted. In *Macauley* v. *Waterman S.S. Corporation*, 327 U.S. 540, this Court, after reviewing all the possibilities of injury which respondents there suggested might occur, said: (p. 545)

> "Even if one or all of these things might possibly occur in the future, that possibility does not affect the application of the rule requiring exhaustion of administrative remedies."

A remedy, legal or otherwise, is exhausted when the party possessing the remedy has done everything he can possibly do with the remedy to prevent the impending injury. When the further control over the so-called remedy is no longer in his hands, but in the hands of "an independent agency of the Executive Branch of Government" (the statute creating The Tax Court so defines it, 26 U.S.C. 1100), he has no remedy to exhaust. Appellant herein has complied with every requirement of the Renegotiation Act. It promptly submitted all data requested. It attended all conferences to which it was called. It petitioned the Board to review the determination of its delegate, Patterson. It filed its petition in The Tax Court within 90 days after Patterson's decision. When a motion was made to strike that petition because it was filed during the time the Board might initiate a review, it prepared a second petition for filing. After the Board refused to initiate a review of Patterson's determination as its delegate, appellant filed in The Tax Court its second

petition for redetermination. That was the entire remedy given appellant by the Act. Appellant had then done all it could possibly do with the administrative remedy. It had then exhausted the remedy given it.

The decision of the trial court insofar as the doctrine of the exhaustion of administrative remedies is concerned proceeds from an inaccurate understanding of the Renegotiation Act, and of the rule relative to the exhaustion of legal remedies as applied in those cases where statutes of a completely different nature were being considered.

In *Arrow Distilleries* v. *Alexander*, 24 F. Supp. 880, (aff. 306 U.S. 615) upon which decision the District Court relied in the instant case, the Court, quoting from *Myers* v. *Bethlehem Corporation*, 303 U.S. 41, said: (p. 882)

> "Thus a complete administrative remedy is provided.
>
> '*In Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, the Supreme Court said—The long settled rule of judicial administration is 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'"

But the District Court has overlooked or misapprehended the nature of the statute involved in that case. In the opinion in the *Arrow* case, it is said (p. 881):

> "From any order suspending, revoking or annulling a permit, an appeal may be taken to the appropriate Circuit Court of Appeals or to the United States Court of Appeals for the District of Columbia; the court is given exclusive jurisdiction to affirm, modify or set aside such order in whole or in part, *and the commencement of proceedings in the Court of Appeals shall, unless specifically ordered by the Court to the contrary, operate as a stay of the administrator's order.* (Section 4 (h), 27 U.S.C.A. Sec. 204 (h).)" (Italics ours.)

In *Myers* v. *Bethlehem Corporation*, 303 U.S. 41, this Court in its opinion said: (p. 48):

> "The grant of that exclusive power is constitutional because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. *No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it.*" (Italics ours.)

In each of those cases, as in others where the statement is made that the administrative remedy must be exhausted before any other procedure may be used, the aggrieved party does not feel the impact of the statute until the final reviewing process has been completed. Under these circumstances he sustains no injury while awaiting the action of the reviewing body. If the Renegotiation Act were that type of statute, appellant would have little cause to complain of the ineffective administrative remedy, or of the application of the rule relating to the exhaustion of administrative remedies. But that is *not* the nature of the Renegotiation Act. Action under the statute is not suspended *pending* the determination of the reviewing body. The reviewing body has no power to suspend action pending redetermination. Exactly the contrary is the fact. Prior to and pending action by the reviewing body, (The Tax Court) and after appellant has done all it can do, the contractor feels the impact of the statute. That is when collection is made by order of the Board. With the doctrine of exhaustion of administrative remedies, applied to statutes under which the orders of administrative bodies are not effective until the review-

ing body has acted, we have no dispute. But that doctrine and its application to those statutes has no similar application to the Renegotiation Act where the injury is sustained prior to and pending the actions of the reviewing body. The collection is not subject to the order of The Tax Court, but occurs prior to and regardless of the action of The Tax Court. The subsequent order of The Tax Court cannot direct repayment.

The distinction existing between the two types of statutes is best presented by the dissenting opinion in the case of *Columbia System* v. *United States,* 316 U.S. 407, when, speaking of the cases cited in the opinion of the Court, it is said: (pp. 433-434)

> "The characteristics of the administrative determinations in all the cases on which the Court's opinion relies were wholly different. In each one the force of the law, either through criminal prosecution or injunction or fine or some other judicial remedy, could immediately be brought to bear to enforce the command of administrative agency. In none of the cases was an administrative action held reviewable which in itself entailed no immediately legal consequences."

It is apparent that a petition in The Tax Court was never intended to be more than a mere formality, which would not and does not protect the contractor. Overlooked, however, were the decisions of this Court as illustrated by the decision in *Porter* v. *Investors Syndicate,* 286 U.S. 461. That case shows the fallacy of the attempted application of the doctrine of exhaustion of administrative remedies to statutes of this type. It reiterates the rule applicable under this type of statute, namely, where the statute is immediately effective on the individual, regardless of the action of the reviewing body, resort may be had to the courts, for the protection of property. In that case recourse was had to a Federal court to enjoin

the enforcement of an order of the Security Commissioners of Montana, revoking a license as a dealer in securities, pending action of the reviewing court. It was there said: (pp. 470, 471)

> "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co.* v. *Lewis*, 241 U.S. 440, 454. But where either the plain provisions of the statute (*Pacific Tel. Co.* v. *Kuykendall*, 265 U.S. 196, 203, 204) or the decisions of the state courts interpreting the act (*Oklahoma Nat. Gas Co.* v. *Russell*, 261 U.S. 290) preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified."

That is the rule applicable to statutes such as the Renegotiation Act. That case recognizes the remedy which one may invoke when confronted with the certain injury due to unauthorized acts of an administrative body. Such a remedy may be invoked while the process of administrative review is being completed, in order that irreparable injury may not result.

The second misunderstanding of the doctrine of exhaustion of administrative remedies is based upon the assumption that the remedy is not exhausted until the reviewing agency itself has completed its duties.

In a recent decision of this Court, *Estep* v. *United States*, 327 U.S. 114, this Court speaking of the exhaustion of administrative remedies as applied to the Selective Service Act, said: (p. 123)

> "Here these registrants had pursued their adminis-

> trative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them."

In this case, appellant has done all that it can do. Upon the filing of appellant's petition in The Tax Court, appellant exhausted its remedy. Submission to the demands of the Board by inaction on appellant's part, would be satisfaction of the order of the Board, but not a further step to obtain relief therefrom.

It may be assumed that the framers of the Renegotiation Act intended to circumscribe the judicial power of the courts and by this legislation, which confers a sterile right of review, to give immediate effect to administrative action. The absence of any form of judicial review would so indicate. But when circumvention of judicial power gives effect to administrative action, beyond the limits of constitutional authority, then the courts of equity have always provided a remedy.

In the concurring opinion of Mr. Justice Murphy in the *Estep* case, it is said: (p. 127)

> "'As this Court has previously said, 'Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.' *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 52."

The doctrine of exhaustion of administrative remedies was never intended to prevent recourse to a court of equity for relief from a statute such as the Renegotiation Act.

Before attempting to apply the doctrine of exhaustion of administrative remedies to every case where an administrative remedy is provided, consideration must be given to

the nature of the statute, the application of the statute, and the rights involved. There are, in our opinion, four situations which must be considered.

First: There are those cases where the statute itself provides for determination of a court before the party may feel the impact of the statute. In those cases, this court has said that no complaint in equity will lie to test the constitutionality of the questioned act. Of this type of case, the *Myers* and *Arrow Distilleries Co.* cases are typical.

Second: There are statutes where the danger to property rights exists by the very existence of the statute. In such cases, the Court has not been hesitant about granting an injunction, notwithstanding the complainant has never done anything to recognize the administrative process. It is not as the Court below supposed, that because an administrative process exists which may be invoked, but rather whether the appellant is in imminent danger of being ruined by an unconstitutional statute or rule. Of this type of case, *Pierce* v. *Society of Sisters*, 268 U.S. 510, and *Columbia System* v. *United States*, 316 U.S. 407, are typical.

Third: There is the third class of cases where this court has recognized that although administrative review is authorized and not availed of, injunction may be granted by courts, because the review provided is said to be a mere formality. Of this type the cases of *Levers* v. *Anderson*, 326 U. S. 219; *United States* v. *Abilene & Southern Co.*, 265 U. S. 274, and *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, are typical.

Fourth: There are those statutes where, during the appellate administrative process, and prior to the issuance of the final command, the party feels the impact of the statute. In such cases, the court will restrain the ad-

ministrative order, so that the party will be spared until the process shall have been completed. Of this type of case, *Porter* v. *Investors Syndicate*, 286 U.S. 461, is typical.

In *Yakus* v. *United States*, 321 U. S. 414, 438, it was said:

> "The denial of a right to a restraining order or interlocutory injunction to one who has failed to apply for available administrative relief, *not shown to be inadequate* is not a denial of due process," citing *Natural Gas Co.* v. *Slattery*, 302 U. S. 300. (Italics ours.)

If the statute provides that the individual may receive the impact of the first administrative determination while he is invoking the second, such remedy is inadequate. If the statute also precludes him from the protection of the Court while he is so acting, that statute does not provide due process.

(B) The remedy in the Court of Claims.

In the opinion of the District Court, it is suggested "that as to any liability on the United States, its (appellant's) remedy is in the Court of Claims." Unlike the Royalty Adjustment Act which was before this Court in *Coffman* v. *Breeze Corporations*, 323 U.S. 316, which the District Court cited, appellant has no right in the Court of Claims. A careful reading of the Renegotiation Act fails to disclose any reference to a contractor's or subcontractor's right in the Court of Claims. Indeed, it would appear that any right which might have existed prior to February 25, 1944, to resort to the Court of Claims, was expressly taken away from the individual by the Renegotiation Act.

Section 403 (e) (1) of the Renegotiation Act provides in part as follows:

"Upon such filing (of a petition in The Tax Court) such court shall have exclusive jurisdiction by order to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor and such determination shall not be reviewed or redetermined by any court or agency." (Portion in parentheses supplied by us.)

Even if the reference in the opinion of the District Court to the Court of Claims, be assumed to refer to amounts paid into the Treasury of the United States by customers of appellant under directions of the Secretary of War (as occurred in the 1942 renegotiation and as will occur again in the 1943 renegotiation unless the injunction issue), it is impossible to see how such a procedure could be said to be a plain, speedy and adequate remedy.

Before any amount could be said to be due appellant for which a claim could be asserted in the Court of Claims (if one could ever be asserted there), The Tax Court would be required to have made a determination. But long *before* the Tax Court acts, collection will have been made. Only long *after* The Tax Court acts could resort be had to the Court of Claims. The so-called remedy in The Court of Claims is one full step *behind* the so-called remedy in The Tax Court. All that was said before as to the ineffectiveness of the petition in The Tax Court applies to a proceeding in the Court of Claims, if one could be maintained there.

(C) The right to maintain a suit at law against appellant's debtors.

It was suggested by the court below that appellant has a complete remedy at law in that it may maintain suits against its several debtor customers for the amounts due upon their respective accounts. It said, "these debtors are not numerous and so far as the plaintiff being entitled to relief to avoid a multiplicity of suits, it has a complete remedy in the Court of Claims for all sums of which it may be deprived if the Renegotiation Act is unconstitutional."

As previously shown, there is no right whatsoever to appear in the Court of Claims.

While it is not known what the District Court meant by the statement that appellant's debtors are not numerous, it appears from the affidavits filed in this cause that to recover $270,000 appellant would be required to sue sixteen or more of its customers. (R. 132)

The institution of several suits in several jurisdictions will require the employment of additional attorneys. It will require additional traveling and the expenses incidental thereto, and, more important, it will require the time and attention of appellant's executive officers. This Court certainly knows that the cost of attorneys' fees, stenographic fees, traveling expenses and other expenses which will be inevitable in the trials of sixteen or more cases, are costs which are not recoverable. The loss which will inure to appellant by reason of the diversion of its executives' time and energies is neither calculable nor recoverable. To say that this case should not be entertained because appellant will not suffer irre-

parable injuries on this score, when this proceeding in equity would speedily and conclusively determine the issues, is to deny one of the historic reasons for the existence of equity.

More serious, however, is the effect of those sixteen suits. These debtor customers of appellant have never denied their indebtedness to appellant for the merchandise furnished them. The customers of appellant, who in July, 1944 paid into the Treasury of the United States $204,000 which they owed appellant, believe that they have discharged their obligation to appellant. When new debtor customers pay into the Treasury of the United States, upon the direction of the Secretary of War, an additional $270,000 due appellant, they, in their opinion, will be discharging their obligations to appellant. None of these customers has any interest in the constitutionality of the Renegotiation Act, or in its operation upon appellant. They do have a real interest in not being a defendant in a suit instituted against them by appellant to recover money which in their opinion they have paid. The time of their officers and of their attorneys is valuable, and to devote any part of that time and effort to a dispute between the War Contracts Price Adjustment Board and appellant is neither their duty nor their desire. Their natural reaction can be only one; to cease doing business with Aircraft & Diesel Equipment Corporation. If the controversy between appellant and the Board cannot be determined without customers being subjected to suits (which appellant does not desire to institute), then there will be no customers. Then is the time when appellant will sustain additional injury. The extent of that injury, while certain and substantial, cannot now be determined. Good will, friendly relations, satisfied customers are not to be lightly cast aside. They are the life of a business. Appellant could have maintained a suit in 1944 against the cus-

tomers for the $204,000 but what would have been the consequences of such a suit to appellant? To be deprived of $204,000 of its funds was to sustain a substantial injury; to be deprived of an additional $270,000 is to sustain further injury, but to be required to sue its customers because of the unauthorized acts of a governmental agency as the means of determining the legality of the action taken by such agency, is to be required to sustain irreparable injury. In the business world one does not knowingly kill the goose that lays the golden egg. The alleged remedy by suit against customers is more destructive than the injury. No sane businessman would voluntarily use such a remedy. No individual should be required to use such a procedure to determine a question of great public importance.

That the three suggested remedies are wholly inadequate is apparent from careful consideration of those remedies.

(D) Appellant will sustain irreparable injury if the injunction be not granted.

Notwithstanding the differences between the Renegotiation Act and those statutes where the effect of the statute is not felt until the reviewing agency has acted, and notwithstanding the inadequacy of the suggested remedies, it will be contended that appellant is not entitled to have the constitutionality of the Renegotiation Act determined in this proceeding. It will be asserted that since appellant knows the exact amount of money taken from its customers it can sue such customers for the respective amounts paid by them into the Treasury and in such proceedings determine the unconstitutionality of the Act. This contention requires the recognition of a most novel proposition of law: that if A commits a wrong

against B, B is without a remedy against A because B may sue C and recover from C the amount which A unlawfully caused to be taken from B. If the first act be unconstitutional, or the Secretary of War acted beyond his powers, then he, stripped of the protection of the Act, wrongfully caused customers of appellant to break contracts with the appellant. If the Renegotiation Act is unconstitutional, the Secretary of War is about to commit a second wrong of a similar nature. For each of those wrongs, the wrongdoer himself must assume full responsibility, and not attempt to avoid that responsibility by asserting that a right exists in the appellant to sue one who has committed no offense and whose only act consists in compliance with an order of one in apparent authority.

In *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, quoting from *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U.S. 549, 566, 567, it is said: (p. 584)

> "If one be sued for conduct harmful to plaintiff his only shield is a constitutional rule of law that exonerates him."

Appellant's loss, if it is compelled to sue its customers, is not alone in the $270,000 paid into the Treasury of the United States. Its loss is not $270,000 plus the expenses incurred in the several suits, and plus interest from the date of payment into the Treasury. In addition to the loss of its money, the costs of such suits, and the necessary delay incurred, appellant's real loss, if it be compelled to sue customers, is much more substantial than that, although incapable of exact ascertainment. The loss which the appellant will sustain is the loss of the customers themselves.

This Court has recognized, in at least three cases, that a law which disturbs the business relations between a complainant and its customers, so that the customers will

cease to be customers, creates such irreparable injury that an injunction should be granted to prevent such loss. These cases are *American Federation of Labor et al.* v. *Watson*, 327 U.S. 582, *Pierce* v. *Society of Sisters*, 268 U.S. 510 and *Columbia System* v. *United States*, 316 U.S. 407. In view of these decisions, it is not sufficient to do, as the District Court did, rely upon cases such as the *Myers* case or the *Arrow Distilleries* case, since in those cases the Court was not only dealing with a different type of statute, but with a situation where the denial of the injunction did not result in the destruction of a business. Had the complainant in the *Myers* and *Arrow* cases pursued the adminstrative remedies provided by the statutes questioned in those cases, they could have had a determination of all the questions before they had sustained any such loss as will be sustained by appellant in this case.

It is respectfully submitted that this Court will not require the appellant to sustain irreparable injury in the destruction of its business, by withholding injunctive relief, when, by that relief only, can appellant avoid the certainty of irreparable injury.

CONCLUSION.

In the foregoing pages of this brief we have shown that the renegotiation acts violate the provisions of Article I, section 1, Article III, sections 1 and 2, of the Constitution of the United States and violate the provisions of the Fifth, Seventh and Tenth Amendments thereto. We have also shown that in the action proposed to be taken, appellant will sustain an irreparable injury.

In our opinion no case has arisen recently in which questions of greater importance are presented than those in this litigation. These questions are of importance not only to the appellant and to contractors generally, who are contesting in the Tax Court of the United States, and elsewhere, the various determinations made by the Secretaries and by the War Contracts Price Adjustment Board, but to the general public which recognizes the extent of the doctrine enunciated by the renegotiation acts.

Appellant has been criticized by appellees for prosecuting this suit for the alleged reason that such action on appellant's part interferes with the prosecution of the war and permits war profiteering to take its uncontrolled course. This observation is unwarranted and unjustified. Appellant is not a war profiteer. Had appellant overcharged its Government, or had it charged its Government more for materials than it charged other contractors, a consciousness of guilt would have restrained appellant's action. As it is, appellant has the firm conviction that its action is morally and legally justified. Appellant does not believe that it is within the powers of the Congress to vest in an administrative agency the sole and arbitrary power of determining what profits any individual contractor may retain. This does not mean that appellant denies the power of the Congress exercised within con-

stitutional limits, to do with men, women and property whatever may be necessary and requisite to effectually prosecute a war. Appellant does contend, however, that those great and necessary powers shall not be used, under the pressure of war, to deprive the citizens of the rights established and guaranteed by the Constitution of the United States.

Respectfully submitted,

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